UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket No. 93-4105
Decided Sept. 23, 1994

SCFC ILC, INC., doing business as MountainWest Financial, Inc.,

Plaintiff-Counter-Defendant-Appellee,

v.

VISA USA, INC.,

Defendant-Counter-Claimant-Appellant,

v.

SEARS, ROEBUCK AND COMPANY, an Illinois corporation; SEARS Consumer Financial Corporation an Illinois corporation,

Counterclaim-Defendants-Appellees.

American Bankers Association; Independent Bankers Association of America; Colorado Bankers Association; Community Bankers Association of Kansas; Community Bankers Association of Oklahoma; Independent Bankers of Colorado; Independent Community Bankers of New Mexico; New Mexico Bankers Association; Kansas Bankers Association; Utah Bankers Association; Wyoming Bankers Association; American Automobile Manufacturer Association; Boulder Technology Incubator; Chevron Corporation; Corning Incorporated; Pacific Telesis Group; Plasticom Industries, Inc.; Rmes Communications, Inc.; American Financial Services Association; Bankcard Holders of America,

Amici Curiae.

Appeal from the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

D.C. No. 91-C-47-B

M. Laurence Popofsky (Stephen V. Bomse, Marie L. Fiala, Renata M. Sos, Robert G. Merritt, Heller, Ehrman, White & McAuliffe, San Francisco, California; Dale A. Kimball, Clark Waddoups, Heidi E.C. Leithead, Kimball, Parr, Waddoups, Brown & Gee, Salt Lake City, Utah, with him on the briefs), Heller, Ehrman, White & McAuliffe, San Francisco, California, for appellant Visa USA.

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E. Thomas Sullivan, Tucson, AZ, on the brief for *amicus curiae* Bankcard Holders of America.

Phillip Areeda, on the brief for *amici curiae* American Automobile Mfrs. Ass'n., *etc.*

Before MOORE and SETH, Circuit Judges, and DAUGHERTY, District Judge.*

* Honorable Frederick A. Daugherty, Senior District Judge for the United States District Court for the Western District of Oklahoma, sitting by designation.

JOHN P. MOORE, Circuit Judge.

Visa USA provides payment services to its 6,000 members which individually issue credit cards to consumers. Sears, Roebuck and Company, a competitor offering its own credit card, the Discover Card, wanted to become a Visa USA member and also issue Visa cards. The question presented by this case is whether Visa USA's refusal to admit Sears to its joint venture restrains trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Rejecting Visa USA's legal and factual challenges to the jury's adverse verdict, the district court found the evidence of exclusion constituted antitrust injury and harm to competition. *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F. Supp. 956, 990 (D. Utah 1993). We conclude, however, the exclusion does not trigger section 1 liability and reverse.

I. Background

As set forth more extensively in the district court's order, the factual background of this dispute encompasses the history of the general purpose credit card industry. What is known today "everywhere you want to be" as *Visa* has evolved over the last forty years from direct extensions of credit for a single purpose; for example, oil company or department store credit cards, to a "charge card which could be used for general purposes at a wide variety of retail establishments." *Id.* at 963 n.2. The resulting card was offered without geographic restrictions under the neutral trademark, Visa.

Now, to its approximately 6,000 associates, Visa USA,[1] the umbrella organization, provides technology to process credit card transactions and regulates and coordinates the individual programs through rules and bylaws proposed by management and adopted by a board of directors (the Board).[2] The bylaws cover a range of issues:

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[1] In this opinion, Visa USA designates the joint venture named as the defendant. We refer to its credit cards simply as Visa.

[2] The Visa USA Board draws its members from twelve designated regions, each electing a representative, generally a bank's chief executive officer or chief operating officer. Based on a formula, larger regions may have a second board seat. Seven directors are elected nationally, and a separate seat is reserved for a director who represents small banks. Citicorp

members' liability, termination, and confidentiality, to name a few. However, since its inception, each Visa USA member independently decides the terms and conditions of credit extensions, the number of cards issued, and the interest rates charged. That is, individual banks establish, operate, and promote their own credit card programs under the Visa aegis, while Visa USA serves as a clearinghouse for the ultimate transaction between issuer, consumer, and merchant. The fees members pay to Visa USA for its services vary according to a formula established by the association.

Any financial institution which is eligible for federal deposit insurance may become a Visa USA member. Among its current membership are Citicorp, Ford Motor Company, General Electric, and ITT. Although the membership was originally restricted to exclusively issuing Visa cards, a challenge to the bylaw prohibiting members from issuing MasterCard forced Visa USA to withdraw the rule. See *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 345 F. Supp. 1309 (E.D. Ark. 1972), *rev'd*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974). Consequently, Visa USA members now generally offer both Visa and MasterCard, a practice referred to in the industry as *duality*.

Prior to its entry into the general credit card arena, Sears[3] mustered a bankcard steering committee to investigate the alternatives of developing its own general purpose charge card or joining the Visa USA/MasterCard association. In 1985, Sears introduced the Discover Card, its own proprietary card, one "owned and distributed solely by a single business entity," 819 F. Supp. at 963 n.3., to be marketed and issued nationally. This entry was

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has its own seat on the board based on the rule of automatic appointment to any member with more than ten percent of the total volume of outstanding cards. MasterCard board members are not permitted to sit on the Visa USA board.

[3] Sears, Roebuck and Company is the parent corporation of Sears Consumer Financial Corporation and Dean Witter Financial Services Group, its wholly owned subsidiaries. Sears' counsel informed the court during oral argument that Dean Witter then owned plaintiff MountainWest. However, the designation Sears in this opinion collectivizes plaintiff bank and the Sears entities involved in the litigation.

intended to compete with Visa, MasterCard, American Express, and Citibank's Diners' Club/Carte Blanche, the only other national proprietary cards. Despite Visa USA's aggressive efforts to thwart its new rival, *id.* at 963, Discover succeeded with such innovations as preapproved, no fee cards offering cash back bonuses to cardholders and deeper discounts to merchants. In fact, at the time of this litigation, Sears was the largest individual issuer of credit cards in terms of the number of cards distributed and the second largest, following Citicorp, in credit card receivables volume.[4] To compete with the Visa Gold Card and American Express Optima Card, Sears also introduced an upscale Discover Card called Prime Issue. Another Sears' entity, Sears Payment Services (SPS), assists other companies in operating their credit card programs.

In 1988, Greenwood Trust Company, a Sears-owned Delaware bank which issues Discover Card, applied for membership in Visa USA, prompting the Board to adopt the bylaw which is the genesis of this antitrust litigation. The amendment to the Board rule, Bylaw 2.06, stated:

> Notwithstanding (a) above, if permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards.

Subsequently, the Board denied Greenwood Trust's application to Visa USA.

In 1990, the Resolution Trust Corporation sold Sears the assets, including the Visa USA membership, of MountainWest Savings and Loan Association, a bankrupt savings and loan in Sandy, Utah. Sears then created a new entity, SCFC ILC, Inc., doing business as MountainWest Financial, by merging the Sandy bank with Basin Loans, a Utah Industrial Loan Company.

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[4] In 1991, approximately 24 million Discover cards had been issued, while Citicorp had approximately 21 million cards in the market.

Through this vehicle, Sears was poised to inaugurate a national Visa program it dubbed the Prime Option card, a charge card featuring a two-tiered interest rate, 9.9% for the first two months and 15.9% thereafter. To this end, Sears moved Discover's top executives to Prime Option and ordered an initial printing of 1.5 million Prime Option Visa cards. However, upon inadvertently discovering the plan, Visa USA cancelled the printing and invoked Bylaw 2.06 to exclude Sears from the association. Sears then instituted this antitrust litigation.

II. Fed. R. Civ. P. 50(b) Review

In this appeal, Visa USA contends Sears has failed to carry its burden of showing Visa USA's conduct was harmful to competition in violation of section 1. Indeed, Visa USA underscores, the district court conceded had it tried the facts, it "would have concluded that the harm to competition from letting Sears into the Visa system is greater than any harm from keeping Sears out." 819 F. Supp. at 983. Sears, however, urges this fact-intensive case persuaded the jury that preventing consumers access to the Prime Option card and destroying rivals' incentives to develop new proprietary cards harmed competition.

Nonetheless, we focus only on those relevant antitrust facts, which, when viewed most favorably to Sears, underpin our plenary review under Fed. R. Civ. P. 50(b). In the context of this case, if there is evidence upon which a jury could properly find Visa USA restrained trade, we must affirm. 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.07[2], at 50-76 (2d ed. 1994). Naturally, we do not weigh the credibility of the evidence when reviewing the record. However, if the evidence is insufficient "under the controlling law," Fed. R. Civ. P. 50(a), we must enter judgment as a matter of law for the moving party.

Having stated its contrary view, but reluctant to substitute its judgment for that of the jury, the district court articulated those facts which it opined could become the basis for judgment:

1. Testimony of Sears' expert, Professor James Kearl, on the appropriateness of calculating Visa USA's market power by aggregating the individual market shares of Visa USA

and MasterCard; and his conclusion that Visa USA exercised market power through its collective power to make rules; and testimony about the "presence of high profits."

2. Dean Witter's president, Phillip Purcell's testimony had Sears known that developing the Discover Card would disqualify it from Visa USA entry, it would not have placed a new proprietary card in the market.

3. Testimony that no new proprietary cards had been introduced in the relevant market since Bylaw 2.06 was enacted although memberships in Visa USA and MasterCard increased.

4. Testimony that Prime Option "would be a low-cost card which would be supported by powerful marketing and advertising strategies on a national level." 819 F. Supp. at 986-87.

5. Testimony by Sears' executives that Discover Card, in the face of Prime Option's entry, would remain an aggressive competitor.

6. Testimony that intersystem competition will not be harmed "because Prime Option Visa was designed to reach that part of the market that Discover does not reach." *Id.* at 987.

7. Testimony that "Sears would benefit significantly from issuing Prime Option Visa as opposed to Prime Option Discover or another separate proprietary card." *Id.*

This evidence, which the district court found sufficient to impose section 1 liability, however, must be placed in the specialized province of antitrust law and section 1. We do so fully recognizing both the evolving legal precedent and the objectives of antitrust regulation: "to improve people's lives . . . [through] economic efficiency . . . more efficient production methods . . . [and] through increased innovation." Stephen Breyer, *The Cutting Edge of Antitrust: Lessons from Deregulation*, 57 Antitrust L.J. 771 (1989). That antitrust objectives often collide with these goals simply

reminds us "[a]ntitrust is an imperfect tool for the regulation of competition." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 39 (1984).

III. Joint Ventures and Section I

Section 1 forbids agreements in restraint of trade.[5] Read costively, Section 1 might prohibit "every conceivable contract or combination . . . anywhere in the whole field of human activity." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60, 31 S.Ct. 502, 516, 55 L. Ed. 619 (1911). However, "the 'rule of reason' limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications." *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) (citing 7 P. Areeda & D. Turner *Antitrust Law* ¶ 1500, at 362-63 (1978)), *cert. denied*, 488 U.S. 1007 (1989). Hence, when we ask if a particular practice is "reasonable" or "unreasonable," or if the practice is "anticompetitive," we use these terms with special antitrust meaning reflecting the "Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods." *Id.* at 486. In this lexicon, a practice ultimately judged anticompetitive is one which harms competition, not a particular competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, *cert. denied*, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 319-20, 82 S.Ct. 1502, 1521-21, 8 L.Ed.2d 510 (1962).

Of course, reasonability is of no consequence when certain practices, for example, price fixing, are entirely void of redeeming competitive rationales. These we deem *per se* illegal under section 1, no offsetting economic or efficiency justifications salvaging them. "This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive." *Northwest Wholesale Stationers, Inc. v. Pacific*

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[5] In part, section 1 states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Stationery & Printing Co., 472 U.S. 284, 289, 105 S.Ct. 2613, 2617, 86 L.Ed.2d 202 (1985).

The sharp line between *per se* and rule of reason analysis, however, especially blurs under section 1 when the actors change. In the case of a joint venture, present here in the Visa USA association, competitive incentives between independent firms are intentionally restrained and their functions and operations integrated to achieve efficiencies and increase output. *See* Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1524 (1982). Although virtually any collaborative activity among business firms may be called a joint venture, joint ventures differ from mergers and cartels

> by the extent to which they integrate the resources of their partners. A cartel constitutes a naked agreement among competitors unaccompanied by any integration of resources. In a joint venture, partners contribute assets, such as, capital, technology, or production facilities to a common endeavor. This integration of resources creates economic efficiencies that cannot be achieved by naked agreements among competitors. Indeed, the efficiencies created by joint ventures are similar to those resulting from mergers—risk-sharing, economies of scale, access to complementary resources and the elimination of duplication and waste. Joint ventures, however, differ from mergers in a critical way: because they are less integrated than mergers, *they allow their partners to continue to compete with each other in the relevant market.*

Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L.Rev. 1, 7 (1991) (italics added). The whole becomes greater than the sum of its parts. However, at its center remains an agreement among competitors to eliminate competition in some way.

The Supreme Court has recognized this tension in its evolving treatment of allegedly anticompetitive agreements by joint ventures. In *Broadcast Music, Inc. v. Columbia Broadcasting, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) *(BMI)*, the Court refused to condemn under a *per se* analysis blanket licenses which amounted to

price fixing among the participants. The joint venture, the American Society of Composers, Authors and Publishers (ASCAP), was created as a clearinghouse through which individual music copyright owners licensed their compositions, and ASCAP then monitored the use of their work. Virtually all participants in the copyright music market participated in ASCAP. However, eschewing *per se* treatment, the Court acknowledged, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23, 99 S. Ct. at 1564. Viewed in this light, the efficiency justification of increasing the aggregate output in the market rendered the agreement procompetitive.

Similarly, in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the Court held inappropriate the application of *per se* treatment to the NCAA's horizontal price fixing and output limitation of the number of games college football teams could negotiate to televise. Again the Court recognized the horizontal restraint on competition was essential to make the product available at all. *Id.* at 101, 104 S.Ct. at 2960. Under a rule of reason analysis, however, the rule decreased output and had the effect of increasing prices. While cooperation may be necessary and justified, the Court suggested it fit a different mold, such as, "rules defining the condition of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Id.* at 117, 104 S.Ct. at 2969.

Finally, in *Northwest Wholesale Stationers*, 472 U.S. at 284, 105 S.Ct. at 2613, the Court looked at the economic efficiency justifications of a joint purchasing cooperative to determine the anticompetitive effect of its expelling a member who did not comply with one of the cooperative's rules. Rejecting *per se* condemnation, the Court suggested the disclosure rule which excluded plaintiff from membership might be necessary to monitor the creditworthiness of the cooperative's members. "Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. . . . Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an

anticompetitive effect is not warranted." *Id.* at 296, 105 S.Ct. at 2620-21 (citations omitted).

In rejecting automatic *per se* treatment in these joint venture cases,[6] the Court directs us instead to look at the challenged agreement to judge whether it represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation; whether it has the effect of decreasing output; and whether it affects price. Underlying these cases is an effort to appreciate the economic reality of the particular business behavior to assure that the procompetitive goals, in fact, are neither undervalued nor mask a reduction in competition. Key to the analysis of "the competitive significance of the restraint," *NCAA*, 468 U.S. at 103, 104 S.Ct. at 2961 (quoting *National Soc'y of Professional Eng'r v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978)), is the Court's appreciation that the horizontal restraint may be essential to create the product in the first instance. That understanding properly values the proprietary rights and incentives for innovation embodied by the joint venture as well as concerns about free-riding, "the diversion of value from a business rival's efforts without payment." *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (7th Cir.), *cert denied*, __U.S.___, 113 S. Ct. 409, 121 L.Ed.2d 334 (1992).

We do not read the Court's precedent involving joint ventures to imply any special treatment or differing antitrust analysis.[7] Indeed, aside from clarifying the inappropriateness of automatically invoking *per se* scrutiny of a joint venture's alleged antitrust violation, the Court has not articulated a different rule of reason approach. Thus, under the Court's precedent, cooperative business activity in one setting may permit its participants to achieve market efficiencies or

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[6] *BMI, NCAA,* and *Northwest Wholesale Stationers* are emblematic and not intended to be all inclusive or exhaustive of the extant Supreme Court precedent on joint ventures under section 1.

[7] We would note, however, some of the commentary on the antitrust treatment of joint ventures suggests a different approach. *See, e.g.*, Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason Or Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1 (1992); Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523 (1982).

economies of scale, while in another, a similar activity might run afoul under rule of reason review.

Again, in the context of section 1, the focus of the procompetitive justifications for the business practice remains the ultimate consumer. To be judged anticompetitive, the agreement must actually or potentially harm consumers. *Stamatakis Indus., Inc. v. King*, 965 F.2d 469 (7th Cir. 1992). That concept cannot be overemphasized and is especially essential when a successful competitor alleges antitrust injury at the hands of a rival. Indeed, "[w]henever producers invoke the antitrust laws and consumers are silent, this inquiry becomes especially pressing." *Chicago Professional Sports*, 961 F.2d at 670.

IV. Market Power

Rule of reason analysis first asks whether the offending competitor, here Visa USA, possesses market power in the relevant market where the alleged anticompetitive activity occurs. The answer to that question may end the suit or permit an abbreviated rule of reason inquiry.

Broadly, market power is the ability to raise price by restricting output.[8] "[I]n economic terms [it] is the ability to raise price without a total loss of sales." 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 501, at 322 (1978). Without market power, consumers shop around to find a rival offering a better deal. Indeed,

> if we accept the notion that the point of antitrust is promoting consumer welfare, then it is clear why the concept of market power plays such a prominent role in antitrust analysis. If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers.

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[8] The 1984 Department of Justice Merger Guidelines define market power as "[t]he ability of one or more firms profitably to maintain prices above a competitive level for a significant period of time." *U.S. Dept. of Justice Merger Guidelines* (1984), *reprinted in 4 Trade Reg. Rep.* (CCH) ¶ 13,103 at 20,556.

George A. Hay, *Market Power in Antitrust*, 60 Antitrust L.J. 807, 808 (1992) [hereinafter *Market Power*].

Consequently, whether a firm possesses market power may facilitate the determination that the practice harms competition and not simply a single competitor. Proof of market power, then, for many courts is a critical first step, or "screen," or "filter,"[9] which is often dispositive of the case. *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666-67 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987). If market power is found, the court may then proceed under rule of reason analysis to assess the procompetitive justifications of the alleged anticompetitive conduct. *National Bancard Corp. (NaBanco) v. Visa, U.S.A.*, 779 F.2d 592, 603 (11th Cir.), *cert. denied*, 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986).

While this approach is "the norm under Section 2 of the Sherman Act, where a firm cannot be found liable unless it has achieved monopoly power or there is a dangerous probability of its doing so," *Market Power*, at 808, this two-step analysis has become equally helpful under section 1.[10] *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); *Ball*

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[9] These screens or filters are presumptions in antitrust analysis. They "help to screen out cases in which the risk of loss to consumers and the economy is sufficiently small that there is no need of extended inquiry and significant risk that inquiry would lead to wrongful condemnation or to the deterrence of competitive activity as firms try to steer clear of the danger zone." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 17 (1984). These "simple rules [ ] will filter the category of probably-beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risks of competitive injury." *Id.*

[10] Again, we recognize the overlaps in analysis between section 1 and section 2 cases as did the district court. Nevertheless, the differences must be underscored, the former involving conduct that doesn't alter market structure; the latter, "a pernicious market structure in which the concentration of power saps the salubrious influence of competition." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980).

Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325 (7th Cir. 1986).

The market power query begins with the determination of the relevant market, "that is, a market relevant to the legal issue before the court." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 518.1c, at 535 (Supp. 1993) [hereinafter 1993 Supplement]. "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956). We also look to the geographic reach of the group of sales or sellers to determine the relevant market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962). Further, "[b]ecause the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes." *Rothery Storage*, 792 F.2d at 218.

> To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.

Id. (quoting L. Sullivan, *Antitrust* § 12, at 41 (1977)).

Although these concepts provide a shorthand for rule of reason analysis, we would be amiss to imply their application is necessarily facile. Each may be problematic:

> There is no subject in antitrust law more confusing than market definition. One reason is that the concept, even in the pristine formulation of economists, is deliberately an attempt to oversimplify–for working purposes–the very complex economic interactions between a number of differently situated buyers and sellers, each of whom in

> reality has different costs, needs, and substitutes. Further, when lawyers and judges take hold of the concept, they impose on it nuances and formulas that reflect administrative and antitrust policy goals. This adaption is legitimate (economists have no patent on the concept), but it means that normative and descriptive ideas become intertwined in the process of market definition.

United States Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 598 (1st Cir. 1993). By defining the relevant market, however, we identify the firms that compete with each other. Plugged into the market power inquiry, we may then determine whether the alleged anticompetitive activity restrained trade, that is, raised price or reduced output.

V. Issuer Market

This case illustrates both the utility and difficulties of the market power tool. In this lawsuit, Sears and Visa USA stipulated "the relevant market is the general purpose charge card market in the United States." 819 F. Supp. at 966. Presently, the only participants in this market are Visa USA, MasterCard, American Express, Citibank (Diners Club and Carte Blanche), and Sears (Discover Card). Competition among these five firms to place their individual credit cards into a consumer's pocket is called *intersystem*. "Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19, 97 S.Ct. 2549, 2558 n.19, 53 L.Ed.2d 568 (1977).

In its complaint, Sears alleged the amendment to Bylaw 2.06 represented a concerted refusal to deal which unreasonably restrained trade in the general purpose charge card market. The parties agreed, and the testimony clearly established that in this relevant market competition occurs only at the issuer level. That is, to the extent that Visa USA is in the market, it operates in the *systems* market, not the *issuer* market. Its *members* issue cards, competing with each other to offer better terms or more attractive features for their individual credit card programs. This is *intrasystem* competition.

The issuer market, thus, remains atomistic, each issuer financial institution, bank, or other entity being independent from another.[11] Although Sears does not dispute this characterization of the market, it contends it attempted to launch its Prime Option program under the Visa aegis to "compete more effectively" at the issuer level. By offering multiple credit cards, Discover and Prime Option Visa, Sears contended it would then "strengthen competition."

If the general credit card issuer market is the relevant market, however, the evidence the district court relied upon to deny the Rule 50(b) motion belies Sears' contention and calls into question the definition of relevant market the court apparently adopted. First, the district court recounted the market shares of each intersystem competitor: "Visa was estimated to possess 45.6% of the nationwide general purpose charge card market; MasterCard, 26.4%; American Express, 20.5%; Discover Card, 5.5%; and Diners Club, 2.0%." 819 F. Supp. at 966 (footnote omitted). Within Visa USA's intersystem share, aggregated to include MasterCard issuers as well, the district court noted the evidence showed "in 1991 the ten largest issuers of Visa and MasterCard accounted for approximately 48% of the total Visa/MasterCard charge volume. The top-ten issuers were Citicorp, First Chicago, AT&T, Chase Manhattan, MBNA America, Bank of America, Nationsbank, Chemical Bank, Banc One, and Wells Fargo Bank. The largest issuer, Citicorp, accounted for approximately $42.5 billion in charge volume in 1991–representing approximately 15.8% of the Visa/MasterCard market and 11.4% of the entire general purpose charge card market." *Id.* at 966 n.8.

While these raw figures may suggest Visa USA possesses market power in the intersystem market, the parties have established a different paradigm. By their agreement, the context of this case was intended to focus on the issuance of credit cards as the relevant market. Indeed, that is the market the district court defined for the

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[11] Although approximately 6,000 financial institutions separately are issuers in the association, setting fees, interest rates, and other conditions, approximately 19,000 "participating members" offer cards under their own names and utilize the services of their issuing bank. Robert E. Litan, *Consumers, Competition, and Choice, The Impact of Price Controls on the Credit Card Industry*, March 1992.

jury. To determine, therefore, whether Visa USA possesses market power, we must compare *issuers*, the point where both Sears and Visa USA agreed they compete. At that level, testimony from both Sears and Visa experts established Discover Card is the second largest issuer preceded only by Citicorp in terms of charge volume, that is, what consumers owe on their credit cards.

Based on the district court's figures, Citicorp's charge volume represented about 15.8% of the Visa/MasterCard market share, aggregated at 72% of the general purpose credit card market. If we compare issuers' charge volume, our calculations demonstrate Citicorp's is 21.9% in the relevant market, while that of Sears Discover Card is 5%. Neither figure reflects *at the issuer* level that Visa USA through its members possesses market power.

Nevertheless, Sears' expert, Dr. James Kearl, upon whom the district court relied to conclude the evidence was sufficient to establish Visa USA's market power, explained he looked at the collective, aggregated shares of Visa and MasterCard, because "we have a collective rule, bylaw 2.06 . . . I found that the collective share was very large, and as a consequence my conclusion was that the collective rule was *an exercise of market power*." (italics added). Dr. Kearl opined the association members

> have both incentive and the ability to exercise that market power. They have the incentive because this market share was large and they want to protect that market share. And they also had the incentive because since this is large, *if they can keep prices up or from falling they can make a lot of money*.

(italics added).

Second, despite the stipulation on the relevant market, "the market relevant to the legal issue before the court," *1993 Supplement*, at 535, the testimony reflects that Sears, in fact, sought to expand its competition not specifically in the general purpose credit card market but in a segment of that market represented by financial institutions or banks. For example, Sears' executive, William O'Hara, stated, "We were trying to compete *in that segment* of the general purpose credit card market called the bank association segment." (emphasis

added.) Visa USA's witness, Richard Rosenberg, explained he voted for Bylaw 2.06, believing that because a non-bank like Dean Witter did not have to comply with certain requirements imposed on banks like the Community Reinvestment Act, Sears would have a competitive advantage over its bank rivals.

Indeed, albeit the stipulation, as the trial progressed, the "relevant market" devolved into *Visa USA's share* of the defined market. Thus, the legal issue was transformed, equating exclusion from Visa USA to exclusion from the market.[12] The evidence, however, does not support this mutation. The district court recognized five active rivals presently compete at the intersystem level. Of that market, for example, Citicorp represents 21.9%, American Express 20.5%, and Sears 5%. At the issuer level, where intrasystem competition occurs, the court found, and the parties' experts agreed, the market is remarkably unconcentrated.[13] Given the wide range of interest rates and terms offered by various issuers and Sears' recognized intersystem strength, we are at a loss to find the evidence to support the district court's contrary conclusion.

From this standpoint, even if Visa USA possesses market power, Dr. Kearl's testimony that Visa USA exercised that market power in *its ability* to make collective rules misses the point in the context of joint ventures. "A joint venture made more efficient by ancillary restraints, is a fusion of the productive capacities of the members of

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[12] This revision of the market distinguishes this case from *Reazin v. Blue Cross Blue Shield of Kan.*, 899 F.2d 951 (10 Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990), upon which Sears relies.

[13] Ironically, the district court rejected Visa USA's argument that the present market is highly concentrated, such that admitting Sears would constitute a violation of section 7 of the Clayton Act. After discussing the Herfindahl-Hirschman Index (HHI), which is used to determine market concentration, the district court rejected Visa USA's aggregation of market shares, stating "the court agrees with Visa's expert Professor Schmalensee that *each* individual issuer of Visa and MasterCard cards should be included in the HHI analysis, resulting in a system HHI of below 500." *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 819 F. Supp. 956, 994 (D. Utah 1993). This figure represents an unconcentrated market.

the venture." *Rothery Storage*, 792 F.2d at 230. The very existence of a joint venture in the first instance is premised on a pooling of resources to affect competition in some manner and is made functional through some form of cooperative behavior or rule-making. However, the Court has made clear, as previously discussed, cooperative conduct alone is not prohibited.

Hence, it is not the rule-making *per se* that should be the focus of the market power analysis, but the effect of those rules–whether they increase price, decrease output, or otherwise capitalize on barriers to entry that potential rivals cannot overcome. Although Dr. Kearl testified "if they can keep prices up or from falling they can make a lot of money" to support his conclusion Visa USA possesses market power, there was no evidence that price had been increased, output had decreased, or other indicia of anticompetitive activity had occurred.

Thus, without any eye on effect, the very exercise of rule-making became the factual basis for rule of reason condemnation of Bylaw 2.06. Consequently, rule-making was not only divorced from its functional analysis but also from the facts of the case. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, __U.S__, __, 113 S. Ct. 2578, 2598, 125 L.Ed.2d 168 (1993). In this complex area, the Court cautioned, "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Id.*

We believe the evidence cited by the district court to conclude Visa USA possessed market power is insufficient as a matter of law. Although the district court did not end its rule of reason inquiry upon that finding, the conclusion set the path for its uncharted journey upon a landscape of speculation, conjecture, and theoretical harm. The consequence is the finding of liability based on tendentious and conclusory statements, none of which amounts to evidence of restraint of trade.[14]

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[14] In particular, Sears, disincentive argument provides the widest array of speculation and raises concerns about its standing to represent the

VI. Efficiency Justifications

We therefore return to the two-step analysis previously discussed to assess the procompetitive justifications of Bylaw 2.06 to counteract Sears' allegation the restraint is unreasonable. Visa USA maintained it instituted Bylaw 2.06 to protect its property from intersystem competitors who otherwise would enjoy a free ride at this time of entry. Its general counsel, Bennett Katz, described technological advancements Visa USA achieved and incentives for innovation to system-wide competition generated. In a letter informing Sears of the Board's action, he stated, "As I indicated to you by phone, we believe that intersystem competition should be preserved and enhanced; membership by Greenwood Trust Co. would have the opposite effect." Describing the industry as small, "we only have three basic competitors . . . Visa and MasterCard . . . American Express and Discover," Katz expressed concern about government regulation if the existing competition diminished or Visa USA became too large.[15] In addition, there was testimony that after duality was permitted, MasterCard and Visa competed less aggressively, consumers regarding the two cards often as interchangeable. Other witnesses expressed concern, for example, about Sears' threat to their own profits; the effect a big player like Sears would have on the many small banks that compete in the Visa USA association; and Sears' likely ability to become a Board member and privy to confidential information.

Against these justifications, Sears offered testimony about a two-stage strategy in which it had always planned to enter the market first with its Discover Card and then with a low-cost Visa card; that marketing the Prime Option card as a Discover Card program would not meet the objectives of "Sears' branding strategy," and that consumers would be harmed by being denied the opportunity to select a Prime Option Visa card from the possible choices in the general charge card market. Broadly, Sears promised a low-cost,

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supposed injury of others hoping to start up proprietary charge cards. Nevertheless, the parties each shared in charting the court's terrain.

[15] In testimony, Katz explained, not only was Justice Department scrutiny a concern, but also "attorneys general around the country who had been looking at Visa and deciding whether it is too large."

competitive alternative to the existing market's cards and elicited, through expert testimony, the prospect of other similarly situated potential intersystem competitors being excluded and discouraged from offering new rival cards because of Bylaw 2.06.

Most of this evidence relied upon by the district court is irrelevant to the central antitrust question posed, however. First, intent to harm a rival, protect and maximize profits, or "do all the business if they can," *Ball Memorial Hosp.*, 784 F.2d at 1325, is neither actionable nor sanctioned by the antitrust laws. "Competition, which is always deliberate, has never been a tort, intentional or otherwise." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987). "Most businessmen don't like their competitors or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money." *Id.* Thus, evidence that a Board member voted for Bylaw 2.06 to discourage price competition within Visa USA may reveal a mental state but is not an objective basis upon which section 1 liability may be found. If Bylaw 2.06 is not "objectively anticompetitive the fact that it was motivated by hostility to competitors . . . is irrelevant." *Id.* (citation omitted).

What we ask under section 1 is whether the alleged restraint is reasonably related to Visa USA's operation and no broader than necessary to effectuate the association's business. *NaBanco*, 779 F.2d at 592, 601. That is, is Bylaw 2.06 ancillary, "subordinate and collateral . . . [making] the main transaction more effective in accomplishing its purpose," which is to provide credit card services to its members? *Rothery Storage*, 792 F.2d at 224. If it is not ancillary, does it restrain trade in a manner which alters the structure of the general purpose credit card market and, thus, harms consumers?

We think the analysis in *Rothery Storage* helps us resolve this question. There, Atlas Van Lines adopted a new policy to prohibit any affiliated company from handling interstate hauling both under its own name as well as under the Atlas name. The policy was intended to prevent its affiliates from using Atlas equipment,

facilities, and services for interstate hauling while independently negotiating contracts for their own accounts.[16] Atlas announced the rule was necessary to prevent its agents from benefiting from a free ride, increasing Atlas' liability for interstate shipments while using Atlas' resources without any attendant return of revenue.

> Atlas has required that any moving company doing business as its agent must not conduct independent interstate carrier operations. Thus, a carrier agent, in order to continue as an Atlas agent, must either abandon its independent interstate authority and operate only under Atlas' authority or create a new corporation (a 'carrier affiliate') to conduct interstate carriage separate from its operation as an Atlas agent. Atlas' agents may deal only with Atlas or other Atlas agents.

Id. at 217.[17] Several Atlas carrier agents claimed the policy constituted a group boycott and filed a complaint under section 1.

After a thorough and well-reasoned analysis, the D.C. Circuit rejected plaintiffs' claim, based not simply on the evidence Atlas did not possess market power in the market for the interstate carriage of used household goods, but also on the conclusion the new rule was ancillary to Atlas' main enterprise, enhancing consumer welfare by creating efficiency. *Id.* at 223. What improved the company's efficiency, the court found, was the elimination of the free ride:

> The restraints preserve the efficiencies of the nationwide van line by eliminating the problem of the free ride. There is, on the other hand, no possibility that the restraints can suppress market competition and so decrease output.

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[16] The new policy responded as well to deregulation of the moving industry. Although regulatory constraints figured in the analysis, the resolution of the central issue was not dependent on that context.

[17] That is, its interstate rivals can no longer compete in interstate hauling both as Atlas agents and as independent agents. The policy, then, is analogous to the rule at issue here.

Id. at 229. This conclusion was built on the foundation of *BMI*, *NCAA*, and *Northwest Wholesale Stationers*.

Similarly, Visa USA urges its concern about protecting the property it has created over the years and preventing Sears and American Express,[18] successful rivals, from profiting by a free ride does not represent a refusal to deal or group boycott but is reasonably necessary to ensure the effective operation of its credit card services. It urges Bylaw 2.06 avoids "free-riding, an unlevel playing field, and the added costs that Sears would impose on VISA members by taking advantage of a brand and operating systems that it not only had done nothing to create but had chosen to compete against." Visa USA contends Sears does not need Visa USA to compete in the relevant market and cannot demonstrate it can only issue a low-cost card with Visa USA's help.

Sears urges the justification is pretext. "In this case, the issue is whether the selective exclusion imposed by Visa's Bylaw 2.06 is ancillary to Visa's legitimate purposes as an open industry association." Sears contends Visa USA is a network joint venture, one whose integrative efficiencies actually grow as its membership increases. To accept Visa USA's analogy to a research venture, one expending individual talent and resources in a small laboratory only to be forced to include rival researchers, Sears argues, is naive. It protests everyone gets into Visa USA except Sears itself. In support, Sears relies on the bulwarks of exclusionary conduct cases.

We do not believe either precedent or policy compels Sears' position, however. For example, *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912) (joint venture railroad companies that acquired Terminal Company, which controlled bridge across Mississippi River, approaches, and terminal at St. Louis, must admit rivals to permit use of facilities on nondiscriminatory terms), involved a "most extraordinary" situation in St. Louis, "and we base our conclusion in this case, in a large measure, upon that fact." *Id.* at 405, 32 S.Ct. at 513-14. In that setting, mandating the combined railroad companies admit their competitors merely permitted joint ownership of common facilities.

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[18] We note that American Express has never participated in this lawsuit.

"The defendants had not built or created anything except a combination to take over existing facilities." *1993 Supplement* ¶ 736.1, at 841.

Similarly, *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (joint venture news gathering agency must provide reasonable access to excluded firms), never stated a joint venture cannot exclude anyone. The Court's prohibition of the membership restriction was focused particularly on the operation of the rule itself, where an individual Associated Press member could singly veto a rival's access to its local market. More importantly, the joint venture, "the largest news agency," was factually unique: its news gathering and dissemination capacity could not be duplicated and represented in and of itself a limitation on nonmembers. *Id.* at 13, 65 S.Ct. at 1421.[19]

We would also distinguish the much-quoted language in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985) (ski company's decision not to participate in an all-mountain lift ticket violated section 2). In that case, defendant ski company justified its refusal to continue offering an all-mountain lift ticket by asserting it had no duty to engage in joint marketing with a competitor. The Court responded by observing:

> The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.

Id. at 601, 105 S.Ct. at 2856 (footnote omitted). In qualifying that right, the Court noted in the context of section 2 the refusal to deal had the effect of making "an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years . . . Ski Co.'s decision to terminate the all-

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[19] *Terminal Railroad* and *Associated Press* are the roots of the essential facility analysis in antitrust. See Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841 (1990).

Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market." *Id.* at 603-04, 105 S.Ct. at 2858.

None of these conditions is present in this case. Bylaw 2.06 did not alter the character of the general purpose credit card market or change any present pattern of distribution. *Id.* Nor did it bar Sears from access to this market. There was no evidence Sears could only introduce a Prime Option card with Visa USA's help or that Visa USA's exclusion from its joint venture disabled Sears from developing its new card under the Discover mantle. More importantly, there was no evidence the bylaw harms consumers, the focus of the alleged violation. Indeed, the evidence established the current market in general purpose credit cards is structurally competitive, issuers targeting different consumer groups and consumer needs. In this market, Sears already competes vigorously. Surely, if its goal is to compete *more effectively* in that market, we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects. "[A] producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other." *Stamatakis Indus.*, 965 F.2d at 471.[20]

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[20] Indeed, when the question becomes whether the restraint is reasonably necessary to achieve the joint venture's goals, "[e]xclusivity of venture membership will not generally be regarded as suspect." *1993 Supplement* ¶ 1506, at 1115. The Department of Justice has stated:

> [S]electivity in the membership of a joint venture often enhances a joint venture's procompetitive potential. Forcing joint ventures to open membership to all competitors (or to license the product of an R&D joint venture to all who seek licenses) would decrease the incentives to form joint ventures . . . For example, the inability to exclude those who would bring little or nothing to the joint venture, or those who would fail to share fully in the risks, would decrease the efficiency of the joint venture and reduce the expected reward from successfully accomplishing the joint venture's mission. An enforcement policy that denied a joint venture the ability to select its members might also encourage firms to forego risky endeavors in the hope of being able to gain access through antitrust litigation to the fruits of the successful endeavors of others. Thus, the

Given Visa USA's justification the bylaw is necessary to prevent free-riding in a market in which there was no evidence price was raised or output decreased or Sears needed Visa USA to develop the new card, we are left with a vast sea of commercial policy into which Sears would have us wade. To impose liability on Visa USA for refusing to admit Sears or revise the bylaw to open its membership to intersystem rivals, we think, sucks the judiciary into an economic riptide of contrived market forces. Whatever currents Sears imagines Visa USA has wrongly created, we believe can be better corrected by the marketplace itself. The Sherman Act ultimately must protect competition, not a competitor, and were we tempted to collapse the distinction, we would distort its continuing viability to safeguard consumer welfare.

VII. Conclusion

Reversal of the district court's order denying Visa USA's Rule 50(b) motion further dissipates the preemptive strike Visa USA attempted by requesting injunctive relief under section 7 of the Clayton Act. The reasoning which underpins our reversal of the district court's order and leaves the present entities in the market unchanged obviates scrutiny under section 7 of the Clayton Act. The district court properly denied relief.

We therefore **REVERSE** the district court's order holding Visa USA liable under section 1 of the Sherman Act. However, we **AFFIRM** its denial of an injunction to Visa USA under section 7 of the Clayton Act for reasons consistent with this opinion.

> Department [of Justice] generally will be concerned about a joint venture's policy of excluding others only if (i) an excluded firm cannot compete in a related market or markets . . . in which the joint venture members are currently exercising market power without having access to the joint venture and (ii) there is no reasonable basis related to the efficient operation of the joint venture for excluding other firms.

Justice Department, International Operations Antitrust Enforcement Policy 42 (Nov. 10, 1988) (CCH Supp.) (quoted in *1993 Supplement* ¶ 1506, at 1115).

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

Docket No. 91-C-47B
Decided April 1, 1993

SCFC ILC, INC., d/b/a MountainWest Financial,

Plaintiff,

v.

VISA U.S.A. INC.,

Defendant.

VISA U.S.A. INC. and Visa International Service Association, Delaware corporations,

Counterclaimants,

v.

SEARS, ROEBUCK AND CO., a New York corporation; Sears Consumer Financial Corporation; and SCFC ILC, Inc., d/b/a MountainWest Financial,

Counterdefendants.

William H. Pratt, Chicago, IL, Gary F. Bendinger, Salt Lake City, UT, Randall A. Hack, Leonard A. Gail, James D. Sonda, James H. Gale, Chicago, IL, Carol Clawson, Richard W. Giauque, Salt Lake City, UT, for plaintiff.

M. Laurence Popofsky, Stephen V. Bomse, San Francisco, CA, Clark Waddoups, Dale A. Kimball, Heidi E. Leithead, Salt Lake City, UT, Renata M. Sos, San Francisco, CA, Scott R. Ryther, Salt Lake City, UT, for defendant.

William H. Pratt, Chicago, IL, Gary F. Bendinger, Salt Lake City, UT, Randall A. Hack, Leonard A. Gail, James D. Sonda, James H. Gale, Chicago, IL, Richard W. Giauque, Salt Lake City, UT, Charles A. Tausche, Reuben L. Hedlund, Chicago, IL, for counterdefendant Sears Roebuck & Co.

William H. Pratt, Chicago, IL, Gary F. Bendinger, Salt Lake City, UT, James H. Gale, Randall A. Hack, James D. Sonda, Chicago, IL, Richard W. Giauque, Salt Lake City, UT, for counterdefendant Sears Consumer Financial Corp.

Stephen V. Bomse, Marie L. Fiala, San Francisco, CA, Clark Waddoups, Dale A. Kimball, Heidi E. Leithead, Salt Lake City, UT, Judith Z. Gold, Susan Rice, Robert G. Merritt, San Francisco, CA, Scott R. Ryther, Salt Lake City, UT, Renata M. Sos, San Francisco, CA, for counterclaimant Visa USA Inc.

OPINION AND ORDER

BENSON, District Judge.

Following a jury verdict in favor of the Plaintiff, a post-trial hearing was held Tuesday, December 22, 1992. The court heard argument on several motions, including: (1) Visa's Motion for Judgment as a Matter of Law under Rule 50(b) of the Federal Rules of Civil Procedure; (2) Visa's Motion for Entry of Judgment on its Clayton Act Counterclaim; and (3) Visa's alternative Motion for New Trial or Conditional New Trial. Sears, as Plaintiff and Counter-defendant, was represented by William H. Pratt and Gary F. Bendinger. Visa, as Defendant and Counterclaimant, was represented by M. Laurence Popofsky, Stephen V. Bomse, Marie L. Fiala, Dale A. Kimball, and Clark Waddoups. Having considered the memoranda, submissions of the parties, and oral argument, the court enters this Opinion and Order.

BACKGROUND

The Plaintiff in this lawsuit is MountainWest Financial, a wholly-owned subsidiary of Sears Consumer Financial Corporation and Dean Witter Financial Services Group, which are themselves

wholly-owned subsidiaries of Sears, Roebuck and Co.[1] The Defendant is Visa U.S.A., Inc. ("Visa"), a non-stock corporation owned by approximately 6000 banks and other financial institutions located throughout the United States.

Visa's history dates back to the late 1950s when Bank of America began issuing the BankAmericard to consumers through an organization of approximately 70 bank franchises. The BankAmericard was the predecessor to the current Visa charge card. A second charge card association, Interbank, was formed and competed directly with BankAmericard. Interbank is now known as MasterCard.

Visa is a form of a joint venture governed by a board of directors which is comprised of bank executives selected from member banks. Visa divides the United States into twelve regions. Member banks in each region elect one director to the board. Large regions are represented by more than one director. In addition, one director is elected by the small banks to represent their interests. Furthermore, any member with more than ten percent of the total volume of outstanding Visa cards receives an automatic position on the Board.

The Visa association itself does not issue charge cards. It provides services to its members, including general advertising and computer services. Visa cards are issued by the individual members. Each of the 6000 members is allowed to set its own terms, deciding what prices to charge and the number of cards to issue.

When the Visa association was formed, its rules prevented members from also belonging to MasterCard. In 1974, a bank in Little Rock, Arkansas, sued for the right to issue both Visa cards and MasterCard cards. *See Worthen Bank & Trust Co. v. National Bankamericard, Inc.*, 345 F. Supp. 1309 (E.D. Ark. 1972), *rev'd*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974). In response, Visa sought advice from the United States Department of Justice to determine whether this prohibition could be considered an antitrust violation. The Justice Department responded by stating that, on the card-issuing level, such

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[1] During trial and in previous decisions, the court has referred to the plaintiff as "Sears." In this Opinion, the court will continue that practice.

a "prohibition of dual affiliation appears unobjectionable." (Def.'s Ex. 102, at 2). With respect to the enlistment of merchants willing to accept the Visa card, however, the Justice Department's opinion was that the bar to dual membership could handicap efforts to create new bank credit card systems and might diminish competition. In other words, the Department of Justice found no problem with prohibiting a bank from issuing both Visa and MasterCard cards, but prohibiting dual affiliation by those banks responsible for signing merchants could pose an antitrust problem. As a result, the Department of Justice concluded that it could not promise that a civil action against Visa would not be initiated if Visa continued to refuse its members the right to issue MasterCard charge cards. In response, Visa withdrew its rule, settled the lawsuit, and allowed its members to also become members of the MasterCard association. Thereafter, most banks and other financial institutions in the United States became members of both Visa and MasterCard. Presently, most Visa members also issue MasterCard cards, a practice known as "duality." Visa contended in this action that as a result of duality, competition between Visa and MasterCard diminished significantly.

In 1982, Sears began investigating an entrance into the general purpose charge card market.[2] Sears had discussions with Visa about the possibility of Sears' issuing a nationwide Visa card. Sears organized a steering committee to recommend a strategy. The committee considered Sears' becoming a member of Visa or MasterCard. The committee also considered developing a new general purpose charge card. In late 1984, Sears decided not to pursue issuing a Visa card at that time, but instead decided to launch

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[2] The general purpose charge card market was defined at trial as consisting of any charge card which could be used for general purposes at a wide variety of retail establishments. Gasoline charge cards, department store charge cards, and other charge cards accepted only at limited locations were not considered to be general purpose charge cards. At the time Sears began its investigation there were five general purpose charge cards distributed nationwide: Visa, MasterCard, American Express, Diners Club, and Carte Blanche.

its own proprietary card[3]–the Discover Card. The Discover Card was introduced in Atlanta, Georgia, in late 1985, and was issued nationally in 1986.

Visa perceived the Discover Card as a direct competitor and made numerous attempts to limit the Discover Card's success. For example, Visa encouraged its member banks to deny the Discover Card access to Visa's merchant card terminals. This strategy forced Sears to develop its own terminals and to offer them to merchants at competitive prices. Thereafter, Visa refused to allow its merchants to process Visa transactions on a Discover Card terminal.[4] Despite Visa's efforts, however, Discover continued to grow and prosper.[5]

In late 1988, Sears applied for membership in Visa through Greenwood Trust Co., a Delaware bank owned by Sears. Sears claims that its primary reason for applying for membership was in response to the competitive actions Visa had undertaken with respect to the Discover Card. In June, 1989, Visa's Board of Directors held a meeting in Cannes, France. At the meeting, the Board considered and unanimously rejected Greenwood Trust's application for membership. The Board also passed an amendment to its bylaws prohibiting Sears, or any other direct competitor, from becoming a

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[3] Proprietary cards were defined at trial as charge cards owned and distributed solely by a single business entity. At the time Sears entered the general purpose charge card market with the Discover Card in 1985, the only other issuers of proprietary general purpose charge cards were American Express and Citibank (Diners Club/Carte Blanche).

[4] Eventually Visa and Sears resolved their disputes regarding the use of terminals, allowing merchants to use the same terminals for both cards.

[5] The evidence at trial indicated that the Discover Card is one of the most effective competitors in the general purpose charge card market. The Discover Card has surpassed its business projections in every year of its existence, earning $80 million in net income in 1989, $117 million in 1990, and $170 million in 1991. (Def.'s Ex. 571). Discover Card has been referred to as "one of the two or three most remarkable success stories in American business in the late 1980s[.]" (Tr. at 256).

Visa member. The following is an excerpt from the official minutes of the meeting of the Board, dated June 5-6, 1989:

> Greenwood Trust Company has made application for Principal membership in the corporation. Greenwood Trust Company is the issuer of Discover cards and has no intention of converting that program; rather, they intend to issue both Discover cards and Visa Cards. In order to preserve and enhance interbrand competition, and upon motion duly made, seconded and unanimously carried, it was
>
> **RESOLVED,** that Section 2.06 of the By-Laws be and are hereby amended by adding the following sentence at the end of that Section as follows:
>
> > "Notwithstanding (a) above, if permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards."

(Pl.'s Ex. 715)

In a letter advising Sears of the Board's action, Visa General Counsel Bennett Katz stated: "[W]e believe that intersystem competition should be preserved and enhanced; membership by Greenwood Trust Co. would have the opposite effect." (Pl.'s Ex. 715). Sears contested Visa's rejection of its application. Sears' officers met with Visa board members in an attempt to resolve the situation, but Visa refused to change its position. Sears threatened antitrust litigation, but took no legal action at that time.

On May 25, 1990, Sears purchased the assets of a small, defunct Utah savings and loan association known as MountainWest Savings & Loan ("MountainWest Savings"). The purchase was made through the Resolution Trust Corporation ("RTC"), which had become the receiver of MountainWest Savings after its failure. Sears merged the

assets of MountainWest Savings into those of Basin Loans, a Utah Industrial Loan Company, and renamed the new entity SCFC ILC, Inc., doing business in Sandy, Utah, as "MountainWest Financial."

One of the assets of MountainWest Savings that Sears acquired from the RTC was MountainWest Savings' membership in the Visa association. MountainWest Savings had become a Visa member in 1982 and had issued approximately 5800 Visa charge cards to its account holders. Notwithstanding Visa Bylaw 2.06, Sears attempted to use MountainWest Financial's Visa membership to launch a special low-interest, Sears-owned Visa card called "Prime Option." Under the Prime Option program, Sears intended to issue millions of Visa cards nationwide. Sears initially requested a printing of 1.5 million Prime Option Visa cards. Upon learning, rather belatedly, of Sears' involvement with MountainWest Financial, Visa refused to grant permission for the initial printing of the Prime Option Visa cards based on Bylaw 2.06's prohibition of Sears' membership in Visa.[6]

In response to Visa's refusal to approve MountainWest Financial's request, Sears filed a five-count Complaint against Visa in the Federal District Court for the District of Utah, on January 17, 1991. Counts I and II raise claims under Section 1 of the Sherman Act, 15 U.S.C. § 1; Counts III and IV raise claims under the Utah Antitrust Act, Utah Code Ann. §§ 76-10-911 to -926; and Count V raises a claim under the Utah Unfair Practices Act, Utah Code Ann. §§ 13-5-1 to -18. Included in Sears' prayer for relief was a request for a permanent injunction.

Shortly after the complaint was filed, Sears moved for a preliminary injunction seeking to compel Visa to allow the launch of the Prime Option Visa card program. Sears' motion was granted by the court. 763 F. Supp. 1094 (D. Utah 1991). The court found that MountainWest Savings' Visa membership had never been

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[6] Sears attempted to gain entry into Visa without clearly disclosing to Visa its affiliation with MountainWest Financial. Aware of Bylaw 2.06, MountainWest Financial failed to reveal to Visa its affiliation with Sears and the Discover Card. Visa discovered that MountainWest Financial was actually owned by Sears only after conducting its own investigation. Visa has pending against Sears a counterclaim for fraud.

terminated, and that Sears was "entitled to enjoy all of the rights and privileges of membership, including the right to launch the 'Prime Option' program." *Id.* at 1098-99. The court further found that issuance of the preliminary injunction would not alter the status quo and that the other requirements necessary for a preliminary injunction had been met. *Id.* at 1100.

Visa appealed the district court's ruling to the United States Court of Appeals for the Tenth Circuit. On June 18, 1991, the Tenth Circuit reversed the holding of the district court, finding that the preliminary injunction would in fact alter the status quo and that Sears, under such circumstances, had not met the heavy burden required for a preliminary injunction. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1102 (10th Cir. 1991). The case was remanded to the district court for further proceedings.

On March 25, 1991, Visa filed an Answer to the Complaint which included a Counterclaim against Sears. Count I of the Counterclaim raises a claim of Trademark Infringement under the Lanham Act, 15 U.S.C. § 1114; Count II alleges a violation of Section 7 of the Clayton Act, 15 U. S.C. § 18; Count III alleges fraud; Count IV raises a claim for unfair trade practices under California law; and Count V raises, in the alternative, a claim for breach of contract.

The parties then resumed discovery in preparation for trial. Another twist was added to this litigation, however, when on December 19, 1991, President Bush signed into law a statute dealing with RTC-transferred institutions. The statute amended the Home Owners' Loan Act, 12 U.S.C. § 1441a, by adding a new subsection, (q), as follows:

> *Continuation of obligation to provide services*
>
> No person obligated to provide services to an insured depository institution at the time the Resolution Trust Corporation is appointed conservator or receiver for the institution shall fail to provide those services to any person to whom the right to receive those services was transferred by the Resolution Trust Corporation after August 9, 1989, unless the refusal is based on the transferee's failure to

> comply with any material term or condition of the original obligation. This subsection does not limit any authority of the Resolution Trust Corporation as conservator or receiver under section 11(e) of the Federal Deposit Insurance Act.

Federal Deposit Insurance Corporation Improvement Act of 1991 § 471, Pub. L. No. 102-242, 105 Stat. 2385 ("Section 471"). Pursuant to this section, persons under contract to provide services to a federal deposit institution prior to its takeover by the RTC are required to continue to provide those services after transfer by the RTC to a new owner–so long as the new owner complies with all of the terms and conditions of the original contract.

In response to the enactment of this statute, Sears amended its Complaint, alleging that Visa's refusal to issue the credit cards sought by Sears constituted a violation of Section 471. Sears moved for summary judgment on that basis. On February 18, 1992, the court denied the motion, finding that Bylaw 2.06's prohibition of affiliation with Sears was a material condition of the original agreement between Visa and MountainWest Savings. 784 F. Supp. 822, 834 (D. Utah 1992). Because MountainWest Savings was bound by the bylaw, the restriction was also effective as to MountainWest Financial, pursuant to the terms of Section 471. *Id.*

On July 30, 1992, the court heard oral argument on various additional motions filed by the parties. These motions included: 1) Visa's Motion for Summary Judgment on Sears' Sherman Act Claim; 2) Sears' Motion for Summary Judgment on Visa's Clayton Act Counterclaim; 3) Sears' Motion for Summary Judgment on Visa's Non-antitrust Counterclaims; and 4) Sears' Motion to Bifurcate the trials of the antitrust and non-antitrust claims. The court denied all motions for summary judgment, finding genuine issues of material fact which required a determination by the trier-of-fact at trial. The court, however, granted Sears' motion to bifurcate the trial. 801 F. Supp. 517, 528-29 (D. Utah 1992). The initial trial would concern only the liability aspects of the antitrust claims. The damages portion of the antitrust claims, as well as all non-antitrust claims, would be tried at a later date, if necessary. *Id.*

Trial began on October 13, 1992. Sears' Sherman Act claim was presented to an eleven-person jury,[7] while, at the same time, Visa's Clayton Act claim was tried to the court. With respect to Sears' Sherman Act claim, the dispute focused on whether the restraint of trade imposed by Bylaw 2.06 is "unreasonable." Sears asserted that the restraint is unreasonable because it substantially harms competition in the relevant market.

For purposes of this lawsuit, it was agreed by both parties that the relevant market is the general purpose charge card market in the United States. At the time of trial, the issuers of general purpose charge cards in the United States were the Visa and MasterCard associations, American Express, Citibank (Diners Club and Carte Blanche), and Sears (the Discover Card). Visa was estimated to possess 45.6% of the nationwide general purpose charge card market; MasterCard, 26.4%;[8] American Express, 20.5%; Discover Card, 5.5%; and Diners Club, 2.0%. Competition among these five brands is known as interbrand or "intersystem" competition. Competition among association members, such as Visa members, is known as intrabrand or "intrasystem" competition.

Sears argued at trial that Bylaw 2.06 hinders competition by excluding Sears' planned Prime Option Visa card from being offered in the market. Sears asserted that the Prime Option Visa card would be a low-cost, highly competitive addition to the Visa system. Bylaw 2.06, it was argued, harms consumers because it prevents them from

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[7] A 12-person jury was initially selected. One of the jurors, however, failed to appear on the first day of trial following jury selection and before the presentation of opening statements. The court proceeded with 11 jurors, with the agreement of counsel for both parties, and in accordance with Rule 48 of the Federal Rules of Civil Procedure.

[8] Evidence at trial showed that in 1991 the ten largest issuers of Visa and MasterCard accounted for approximately 48% of the total Visa/MasterCard charge volume. The top-ten issuers were Citicorp, First Chicago, AT&T, Chase Manhattan, MBNA America, Bank of America, Nationsbank, Chemical Bank, Banc One, and Wells Fargo Bank. The largest issuer, Citicorp, accounted for approximately $42.5 billion in charge volume in 1991—representing approximately 15.8% of the Visa/MasterCard market and 11.4% of the entire general purpose charge card market.

gaining access to the card, thereby hindering intrasystem competition within the Visa system. At the time of trial, this exclusion only applied to two entities–Sears and American Express. In the estimation of Visa's Board of Directors, no other entity was issuing a "competitive" card in the relevant market.

Sears also asserted that Bylaw 2.06 harms competition by discouraging the creation and development of other proprietary cards. Bylaw 2.06, it was argued, punishes those who may seek to offer a successful, competitive proprietary card, such as the Discover Card. Because of the bylaw, non-Visa members who develop a successful proprietary card would be prohibited from joining the Visa system and current Visa members would be expelled from the system if they developed such a card.

In response to Sears' arguments, Visa asserted that Bylaw 2.06 is not unreasonable. Visa maintained that the bylaw is beneficial, rather than harmful, to competition. It asserted that the exclusion of Sears from the Visa association preserves intersystem competition because Discover Card is one of the few successful intersystem competitors with Visa in the relevant market. Allowing Sears to join the Visa system would arguably weaken intersystem competition between Visa and Discover. Thus, Visa submitted, Bylaw 2.06 actually enhances competition in the relevant market. Furthermore, Visa argued that any harmful effects of Sears' exclusion are insubstantial. Because Visa does not set restrictions on the price or output of Visa cards issued by its member banks, it was argued that the present intrasystem competition is vigorous and the exclusion of Sears cannot possibly have a substantial, negative impact on competition in the relevant market.

Following a three and one-half week trial, and two days of deliberation, the jury returned a verdict pursuant to special interrogatories, as follows:

> **QUESTION NO. 1:** Has Sears proved, by a preponderance of the evidence, that Visa's Bylaw 2.06 has a substantially harmful effect on competition in the relevant market?
>
> Yes X. No ___.

QUESTION NO. 2: Has Sears proved, by a preponderance of the evidence, that the harmful effect substantially outweighs any beneficial effect on competition in the relevant market?

Yes X. No ___.

QUESTION NO. 3: Has Sears proved, by a preponderance of the evidence, that it was injured by Visa's Bylaw 2.06?

Yes X. No ___.

Following trial, the parties filed the post-trial motions presently pending before the court. After hearing oral argument, the court took the motions under advisement. The court now rules on Visa's Rule 50(b) Motion for Judgment as a Matter of Law on Sears' Sherman Act claim, Visa's Rule 50(b) Motion for Judgment as a Matter of Law on its Clayton Act Counterclaim, and alternatively, Visa's Rule 59 Motion for a New Trial.

DISCUSSION

I. VISA'S RULE 50(b) MOTION–THE SHERMAN ACT

Visa argues that Sears' Sherman Act claim must fail as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. Visa raises two general arguments. First, Visa argues that Sears' claim is legally insufficient and should never have gone to the jury. This argument is based on general economic principles, including notions of private property and the preservation of efficiency-enhancing joint ventures. Next, Visa argues that the facts of this case are so lacking that no reasonable jury could have ruled in Sears' favor. For organizational purposes, the court will refer to the former as Visa's "legal argument" and to the latter as Visa's "factual argument," recognizing, of course, the essentially legal nature of each argument under Rule 50(b), as well as the considerable overlap of the factors that pertain to both arguments.

A. Visa's "Legal Argument"

Visa's legal argument has been presented several times to the court.[9] The argument has evolved and changed somewhat over time, having been articulated slightly differently each time it has been presented. In each instance, however, the central theme of Visa's legal argument has remained the same: that under the circumstances of this case, the restraint imposed by Bylaw 2.06 cannot violate the antitrust laws. Visa contends that when a joint venture such as Visa does nothing more than refuse to share its property with a successful competitor such as Sears, there can be no violation of Section 1 of the Sherman Act.

1. Legal Structure of the Sherman Act

Before addressing the details of Visa's legal argument, it is helpful to examine Section 1 of the Sherman Act and the legal requirements necessary to establish a violation of that section. Section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

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[9] Visa first raised the argument in support of its Motion for Summary Judgment. The court denied the motion in a written opinion. *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 801 F. Supp. 517, 523 (D. Utah 1992). Thereafter, the issue was raised again in connection with Visa's Motion for Certification for Interlocutory Appeal under 28 U.S.C. § 1292(b), which the court denied. The argument was again presented at the close of Sears' case at trial as Visa's Motion for Judgment as a Matter of Law under Rule 50(a) of the Federal Rules of Civil Procedure. Finally, Visa raises the issue in support of this Rule 50(b) Motion for Judgment as a Matter of Law.

15 U.S.C.A. § 1 (Supp. 1992).[10] The plain language of the section appears to prohibit *all* restraints of trade. However, courts determined early on that the section was not intended to be applied so broadly, finding that "restraint is the very essence of every contract," and "read literally, § 1 would outlaw the entire body of private contract law." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-88, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978); *see also Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918). As a result, it has been clearly established that a restraint of trade does not violate Section 1 unless it is found to be "unreasonable." A restraint of trade is unreasonable if it substantially harms competition in the relevant market to the extent that the harmful effects substantially outweigh any beneficial effects. This process of determining whether a restraint is unreasonable is known as the "Rule of Reason." *See Standard Oil Co. v. United States*, 221 U.S. 1, 67, 31 S.Ct. 502, 518, 55 L.Ed. 619 (1911); *Board of Trade*, 246 U.S. at 238-39, 38 S.Ct. at 243-44; *Professional Engineers*, 435 U.S. at 687-88, 98 S.Ct. at 1363; *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 960 (10th Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990).

a. The Rule of Reason

"[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Professional Engineers*, 435 U.S. at 691, 98 S.Ct. at 1365. This determination is generally made by the trier-of-fact. "[T]he factfinder weighs all of the circumstances of a case in

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[10] Sears' claim is actually one for damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. Although Section 1 of the Sherman Act provides for criminal penalties, Section 4 of the Clayton Act allows for private enforcement of the antitrust laws by private parties. Section 4 provides in relevant part:

> . . . any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . 15 U.S.C.A. § 15 (Supp. 1992).

deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* at 691 n.17, 98 S.Ct. at 1365 n.17. The fact-finder must examine "a variety of actual market factors" in making this determination. *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1298 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073, 110 S.Ct. 1119, 107 L.Ed.2d 1026 (1990). This includes an analysis of the restraint imposed–the nature and history of the restraint, and whether the restraint affects price, output, or product quality. The fact-finder may also examine the relevant market–the structure of the market, the parties' positions in the market, and the nature of the market before and after the restraint was imposed. *Board of Trade*, 246 U.S. at 238-39, 38 S.Ct. at 243-44. Furthermore, a Rule of Reason analysis may include an examination of the party's purpose in imposing the restraint.

Visa correctly observes that not all Section 1 cases must be submitted to a jury. A complete Rule of Reason inquiry often requires a protracted and complicated examination of the relevant facts. As a result, courts have developed presumptions, or "screens," as Visa calls them in its briefs, to filter out those cases which do not require full Rule of Reason analysis by the fact-finder at trial, but rather, may be decided as a matter of law.

b. Per Se Illegality

The first presumption developed by the courts is the rule of *per se* illegality. "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 103-04, 104 S.Ct 2948, 2961, 82 L.Ed.2d 70 (1984). Certain activities are so facially pernicious that they are declared presumptively unreasonable by the court. Agreements and practices which are "plainly anticompetitive," *Professional Engineers*, 435 U.S. at 692, 98 S.Ct. at 1365, and which are lacking in "any redeeming virtue," *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), are presumed to be illegal without conducting a detailed Rule of Reason analysis. Price fixing and bid rigging are examples of these types of activities.

The United States Supreme Court has explained the benefits of the *per se* analysis approach:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable–an inquiry so often wholly fruitless when undertaken.

Northern Pacific, 356 U.S. at 5, 78 S.Ct. at 518.

Courts, however, are hesitant to find alleged restraints of trade illegal *per se*. The anticompetitive effect must be relatively certain. *See United States v. Topco Assocs.*, 405 U.S. 596, 607-08, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act."). Even when the *per se* presumption appears to be proper, the presumption will not be applied if the restraint could possibly have legitimate, beneficial effects or if the restraint is such that it is necessary for the product to exist at all.[11]

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[11] Joint ventures often fall into this category. *See North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1259 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982) ("Because agreements between members of a joint venture can under some circumstances have legitimate purposes as well as anticompetitive effects, they are subject to scrutiny under the rules of reason."); *NCAA*, 468 U.S. at 100-01, 104 S.Ct. at 2960 (*Per se* analysis inappropriate in an industry in which "horizontal restraints on competition are essential if the product is to be available at all."); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1979) ("Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.") Furthermore, the *per se* presumption will not be used against a joint venture if the defendant lacks market power or exclusive access to an essential facility. *See Northwest Wholesale Stationers, Inc. v.*

Regardless whether a restraint is subjected to a full Rule of Reason analysis or a presumption, the "essential inquiry" is the same—whether the restraint substantially harms competition in the relevant market. *NCAA*, 468 U.S. at 104, 104 S.Ct. at 2961. "[T]here is often no bright line separating *per se* from Rule of Reason analysis." *Id.* at 104 n.26, 104 S.Ct. at 2962 n.26.

c. Legal "Screens" for Nonviolations

At the opposite end of the spectrum from *per se* illegality, courts will sometimes find a restraint "reasonable," or perhaps more accurately, "not unreasonable" as a matter of law. This occurs when no reasonable fact-finder could find the restraint to be unreasonable, and therefore submitting it to the jury for a complete Rule of Reason analysis would not be of value. Based on current precedent, there appear to be two general types of cases in this category.

The first situation arises when it can be shown that the defendant does not possess market power. "Market power is the ability to raise prices above those that would be charged in a competitive market." *NCAA*, 468 U.S. at 109 n.38, 104 S.Ct. at 2964 n.38. The plaintiff bears the burden of proving that the defendant possessed and exercised market power.[12] "To demonstrate 'market power,' a plaintiff may show evidence of *either* 'power to control prices' *or* 'the power to exclude competition.'" *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1225-26 n.3 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005, 108 S.Ct. 1728, 100 L.Ed.2d 192 (1988) (emphasis in original). A restraint is not unreasonable under the antitrust laws unless it substantially harms competition. When a defendant lacks market power, it lacks the ability to substantially harm competition. Consequently, when the evidence clearly demonstrates an absence of market power, no reasonable jury could

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Pacific Stationery & Printing Co., 472 U.S. 284, 296-98, 105 S.Ct. 2613, 2620-21, 86 L.Ed.2d 202 (1985).

[12] In some circumstances, not applicable to this case, detailed evidence of market power may be unnecessary. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460, 106 S.Ct. 2009, 2018, 90 L.Ed.2d 445 (1986); *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951, 968 n.24 (10th Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990).

find the restraint to be unreasonable. Under such circumstances, a court may declare the restraint not unreasonable as a matter of law and dismiss the claim without submitting it to a jury. *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 791 F. Supp. 956, 966-67 (N.D.N.Y. 1992); *see Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 482 (3d Cir.), *cert. denied*, __U.S.__, 113 S.Ct. 196, 121 L.Ed.2d 139 (1992); *Rebel Oil Co. v. Atlantic Richfield Co.*, 808 F. Supp. 1464, 1466 (D. Nev. 1992).

The second type of circumstance in which a restraint was found to be "not unreasonable" as a matter of law was recognized in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597, 106 S.Ct. 1348, 1361, 89 L.Ed.2d 538 (1986). There, the Court found that when a plaintiff's theory of violation does not "make economic sense," dismissal is appropriate. *See also Eastman Kodak Co. v. Image Technical Servs.*, __U.S.__, __, 112 S.Ct. 2072, 2083, 119 L.Ed.2d 265 (1992).

The central focus of Visa's legal argument is that the court should apply a shorthand presumption or screen to dismiss Sears' claim without submitting it to a jury. Visa argues that such a dismissal is warranted under the market power and economic sense screens. In addition, Visa proposes that the court adopt a new screen, based upon economic principles, to declare Bylaw 2.06 not unreasonable as a matter of law. The court will now evaluate Visa's position under these three screens.

2. The Market Power Screen

Visa claims the court should find no Sherman Act violation because, as a matter of law, Bylaw 2.06 was not an exercise of market power. Visa submits that because the bylaw does not restrict competition or control the price or output of Visa cards within the Visa system, it cannot be an exercise of market power.

The court finds, however, that the market power screen is not applicable in this case. The market power screen is based on the *existence* rather than the *exercise* of market power. If the relevant facts clearly demonstrate an absence of market power, the court may dismiss the case. If the court determines, however, that there is sufficient evidence from which a reasonable fact-finder could find the

existence of market power, the case must be submitted to the jury. The jury then determines factually whether the defendant possessed market power, and, if so, whether the defendant exercised market power to unreasonably restrain trade.

At trial, Sears presented sufficient evidence of Visa's market power to allow this case to proceed to the jury. The evidence showed that Visa members control 45.6% of the relevant market through the Visa system. This fact alone suggests the existence of market power. The evidence also showed that Visa members, through their membership in the MasterCard association, control an additional 24.6% of the market—for a total of 72%.[13] Sears' expert witness, Professor James Kearl, testified that this position in the relevant market gives Visa members the ability to collectively exercise market power. Accordingly, the court finds there was sufficient evidence of Visa's market power to support a submission to the jury regarding the possession and exercise of that power.

3. The Economic Sense Screen

Visa next argues that Sears' theory of a Sherman Act violation makes no economic sense. This argument is based on the United States Supreme Court's rulings in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), and *Eastman Kodak Co. v. Image Technical Services, Inc.*, __U.S.__, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992), in which the Court recognized that a case may be dismissed when the plaintiff's theory regarding the defendant's alleged restraint of trade makes no economic sense. Under this theory, Visa claims, the court should apply a similar "screen" to find that Bylaw 2.06 is not unreasonable as a matter of law.

Visa bases this argument on the inherent economic benefits of a joint venture, and the claim that a joint venture's exercise of its property rights cannot substantially harm competition. Specifically, Visa emphasizes that Bylaw 2.06 does not restrict competition as to

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[13] In 1991, for example, the top five Visa/MasterCard issuers controlled 36.7% of the total charge volume for the two associations. (Pl.'s Ex. 752). Those five issuers were Citicorp, First Chicago, AT&T Universal, Chase Manhattan, and MBNA America.

price or output. Competition among the 6000 members is said to be vigorous, and therefore the exclusion of one additional competitor cannot harm competition. Visa argues that any challenge to such conduct is economically unsound.

Visa's reliance on the concept of no economic sense used in *Matsushita* and recognized in *Eastman Kodak* is misplaced in the present case. In both *Matsushita* and *Eastman Kodak*, the focus of the economic sense inquiry centered on whether the alleged restraint of trade was economically detrimental to the defendant. If the alleged restraint were significantly detrimental, the plaintiff's argument could be said to make no economic sense and dismissal could be appropriate.

For example, in *Matsushita*, American television manufacturers alleged that Japanese manufacturers, over a twenty-year period, had illegally conspired to drive American firms from the market. 475 U.S. at 577, 106 S.Ct. at 1351. This conspiracy allegedly focused on a "scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [the defendants] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States." *Id.* at 578, 106 S.Ct. at 1351 (emphasis in original). The Court found that a conspiracy to depress prices in the American market to drive out American competitors was implausible because it required the conspirators to incur substantial losses to recover uncertain gains. *Id.* at 590, 106 S.Ct. at 1357. As such, the Court found the allegation made no economic sense because "as presumably rational businesses, [defendants] had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for [defendants] with no corresponding gains." *Id.* at 595, 106 S.Ct. at 1360. The Court concluded that if the defendants had "no rational economic motive to conspire, and if their conduct [was] consistent with other, equally plausible explanations, the conduct [would] not give rise to an

inference of conspiracy," and summary judgment was appropriate.[14] *Id.* at 596-97, 106 S.Ct. at 1361.

Using the *Matsushita* case as a foundation, the concept of "no economic sense" was also used as a defense in *Eastman Kodak*. There, defendant Eastman Kodak, a manufacturer of photocopiers and related equipment, instituted a policy of selling parts only to those who had purchased Kodak equipment, and those who used Kodak service or did their own repairs. __U.S. at __, 112 S.Ct. at 2076-77. After several independent service companies were forced out of business, a group brought suit alleging that Kodak "had unlawfully tied the sale of service for Kodak machines to the sale of parts." *Id.*, __U.S. at __, 112 S.Ct. at 2078. In response, Kodak argued that it made no economic sense for Kodak to raise "its parts or service prices above competitive levels" because potential customers would simply stop buying Kodak equipment. *Id.*, __ U.S. at __, 112 S.Ct. at 2084.

On this basis, Kodak argued that the Court, as a matter of law, should accept a "basic economic reality" that competition in the equipment market would prevent market power in the parts and service areas. *Id.* The Court rejected this argument, finding that it was possible for Kodak to lose equipment sales and still not suffer economic detriment. *Id.*, __U.S. at __, 112 S.Ct. at 2084-88. "The sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales." *Id.*, __U.S. at __, 112 S.Ct. at 2084. As a result, the Court concluded that the plaintiff's argument made sufficient "economic sense" to avoid dismissal. *Id.*, __U.S. at __, 112 S.Ct. at 2088.

In the instant case, Visa argues, in effect, that Sears' antitrust allegation against Visa makes no economic sense. However, unlike the defendants in *Matsushita* and *Eastman Kodak*, Visa does not base

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[14] The case was remanded to the United States Court of Appeals for the Third Circuit which was then "free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that [defendants] conspired to price predatorily for two decades despite the absence of any apparent motive to do so." *Matsushita*, 475 U.S. at 597, 106 S.Ct. at 1362.

this argument on any claim that Bylaw 2.06, as interpreted by Sears, is economically detrimental to Visa members. Rather, Visa claims that Sears' argument should be dismissed as a matter of law because joint ventures have inherent economic benefits. The court finds that Visa's argument is not consistent with the economic sense screen described by the Supreme Court.

Even if Visa's argument of no economic sense were based on claims of economic detriment to Visa, there was sufficient evidence presented by Sears to rebut the claim and warrant a submission of the issue to the jury. Sears alleged that Bylaw 2.06 was designed to economically benefit Visa members by excluding Prime Option Visa, a potentially large-scale, low-cost competitor in the general purpose charge card market. This exclusion, Sears argued, restricts competition within the Visa system, thereby allowing current members to keep prices artificially high.

In evaluating Sears' theory of anticompetitive effects, the court does not find Sears' claims to be economically implausible or senseless. Despite the fact that competition within the Visa system is said to be vigorous, there is evidence to support a reasonable jury finding that Bylaw 2.06's exclusion of Sears from the Visa system harms competition.[15]

4. Visa's Proposed Screen

Regardless of, and in addition to, the applicability of the two previously-mentioned screens of market power and economic sense, Visa argues the court should recognize a new "screen" applicable to the facts here.

Visa's argument rests upon two general economic principles. First, Visa stresses the importance of protecting private property in a capitalistic market. It asserts that a party should not be required to deal with its competitor or share its property absent unusual circumstances. Imposing a duty to deal, it is argued, harms consumers by destroying incentives and innovation. Second, Visa argues that efficiency-enhancing joint ventures such as the Visa association should be entitled to special treatment under Section 1 of the Sherman Act. Such joint ventures, Visa argues, are beneficial to

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[15] *See* Part I.B.2. of this Opinion, *infra*.

competition and consumers. The threat of antitrust litigation, however, discourages the creation of such ventures. Accordingly, Visa contends, they should be entitled to special treatment.[16]

These two economic principles, Visa argues, are so compelling that they warrant special protection from antitrust scrutiny. Specifically, Visa asserts that when a joint venture refuses to deal with a competitor, it should not be subject to Section 1's Rule of Reason examination unless the excluded competitor meets a heightened standard–showing that it is unable to compete without the withheld property. When a competitor is able to compete successfully on its own, it is argued, there can be no antitrust violation from refusing to deal with that competitor. Visa would require that the excluded competitor show that it is unable to compete without access to the joint venture's property. In other words, the property must be an "essential facility" necessary for the success of the excluded competitor.

A competitor challenging its exclusion from a joint venture, Visa argues, is not entitled to a Rule of Reason trial—absent a showing of essential facilities. When such a showing is not made, the court should dismiss the challenge without submitting it to a jury. Based on this analysis, Visa seeks "a 'screen' based on economic learning which justifies a legal rule limiting the circumstances in which a duty to deal will be imposed by the antitrust laws[.]" *Visa's Nov. 24, 1992, Memorandum in Support of Motion for Judgment under Rule 50(b)*, at 12. Visa would have the court employ such a screen to declare Bylaw 2.06 "not unreasonable" as a matter of law.[17]

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[16] These principles are also important to Visa's factual argument. Based upon the same economic principles, Visa argues that no reasonable jury could find Visa's conduct to have a substantially harmful effect upon competition.

[17] It is not entirely clear the extent to which this is a proposal for a new screen or the extent to which it is based on the two previously-mentioned screens of market power and economic sense. In any event, the court recognizes, and Visa concedes, that there is no direct precedent for Visa's argument either in the case law or from the language of the Sherman Act itself.

The court will now analyze Visa's economic principles to determine whether, under the antitrust laws, they are sufficient to impose a heightened burden on the plaintiff. The court will then examine Visa's proposed essential facilities standard, to determine when, if ever, such a showing is required as a matter of law.

a. Private Property: The Right to Refuse to Deal

Visa's first economic principle is based on the premise that the right to deal, or to refuse to deal, with whomever one pleases is subject to special protection from antitrust scrutiny. Visa argues that Bylaw 2.06 is nothing more than a refusal to share its property. The bylaw is merely an agreement among Visa members to exercise their right to refuse to deal with a non-member competitor. This type of agreement, it is argued, does not raise traditional Section 1 concerns and should not be subject to complete Section 1 scrutiny.

Visa submits that there is an important distinction between the types of agreements made among the members of a joint venture. On the one hand, there are those agreements which restrict competition *by and among members* of the joint venture. Such agreements place limits on competition within the system and may result in serious restraints of trade. These types of agreements include price fixing, output limitations, and geographic restrictions. On the other hand, there are those agreements which preserve competition between and among members of the joint venture. For example, when members of a joint venture act as a single unit to refuse to deal with a non-member competitor, Visa argues, intrasystem competition is not adversely affected.

Visa asserts that the difference between these types of agreements is crucial. A limit on intrasystem competition is likely to result in a serious restraint of trade, whereas a refusal to deal will not have the same effect. Visa argues that the former is properly suspect under the antitrust laws, while the latter does not raise the same concerns.

Visa stresses that because of the fundamental difference between the two types of agreements, it would be inappropriate to subject them to the same antitrust standard. An agreement to limit competition among venture members, Visa argues, is properly subject

to full Rule of Reason scrutiny, while a refusal to deal with a non-member competitor is not. Such a refusal, it is argued, should not be limited by Section 1.

Visa contends that the right to refuse to deal with a competitor is important because it protects private property. Protection of that right from strict antitrust scrutiny is essential to the preservation of incentives in the market. Forcing entities to share their property with competitors, it is argued, is harmful to competition in the long run. If firms know they may be forced to share new products and innovations with their competitors, they will be less likely to undertake the effort and the risk required for the development of new products. Rather, the incentive would be to wait for competitors to create new products, and then enter the market by usurping the competitors' innovations. Compulsory sharing of private property discourages innovation and the creation of new products. Because imposing a duty to deal would "negate incentives in our capitalist society," Visa argues that its right to deal with whomever it chooses should be upheld and respected by the antitrust laws. *Visa's Nov. 24, 1992, Mem.*, at 14.

Visa concedes that the right is not absolute. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 2856, 86 L.Ed.2d 467 (1985), the United States Supreme Court stated: "The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." The Court recognized that although there is a general right to deal, or to refuse to deal, with whomever one pleases, that right is restricted by the antitrust laws.

Visa's position, however, is that the right is restricted only in limited circumstances–when the defendant possesses monopoly power, or when the property is an essential facility for competition in the market. Absent these limited and unusual circumstances, Visa argues, the right to refuse to deal should remain unqualified. Neither of these circumstances is applicable to the present case: Visa does not possess monopoly power, and membership in Visa is not an essential facility for Sears' success in the relevant market. Therefore, Visa argues, a duty to deal may not be imposed and Sears' claim should be dismissed.

Visa stresses that *Aspen* is based on Section 2, rather than Section 1, of the Sherman Act.[18] Section 2 requires that a defendant possess and exercise monopoly power in the relevant market. *See Bright v. Moss Ambulance Serv.*, 824 F.2d 819, 823 (10th Cir. 1987) ("The elements of monopolization under Section 2 are 'the possession of monopoly power in the relevant market' and 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966))). Monopoly power is not a requirement under Section 1.

In *Aspen*, a ski resort sued a competitor for violating the monopolization prohibitions of Section 2 of the Sherman Act. 472 U.S. at 595, 105 S.Ct. at 2853. The Court upheld the jury's verdict, finding that the antitrust laws imposed on the defendant a duty to deal with its competitor. *Id.* at 611, 105 S.Ct. at 2861. Visa argues that the duty to deal was imposed only because the defendant possessed monopoly power under Section 2. In a Section 1 case, Visa asserts, a duty to deal will not be imposed absent unusual circumstances equivalent to monopoly power.

Again, Visa argues that imposing a duty to deal is harmful to consumers and competition. It stresses that imposing such a duty will negate incentives for investment, innovation, and product-creation. To protect such incentives, Visa argues, "[a] duty to share or deal must be imposed only under very limited conditions–conditions captured in the notions of essentiality or market power of such a degree that it is tantamount to monopoly or deprivation of an input necessary to effective competition." *Visa's Nov. 24, 1992, Mem.*, at 21.

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[18] Section 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony . . .

15 U.S.C.A. § 2 (Supp. 1992).

Visa's argument raises legitimate economic policy issues. Visa's legal argument fails, however, because it is not supported by the law–it is contradicted by the language of Section 1 of the Sherman Act and all case law interpreting the Act. The law does not recognize an antitrust exemption for a joint venture's refusal to deal. Such refusals are not insulated from the Rule of Reason examination. All combined activities, whether contracts, conspiracies or combinations, which restrain trade–even simple refusals to deal–are subject to the reasonableness inquiry. Economic concerns cannot change the legal structure of the antitrust laws. Nothing in the Sherman Act itself or in the case law suggests that a refusal to deal by a joint venture such as Visa is limited to Section 2 restrictions, or that such a refusal is entitled to a special protective "screen" from Section 1 scrutiny.

The Supreme Court addressed this issue in the *Aspen* case. The Court did not limit the qualification of the right to deal to Section 2 cases. Rather, the Court noted that the right is also qualified by Section 1, stating that "[u]nder § 1 of the Sherman Act, a business 'generally has a right to deal, or refuse to deal, with whomever it likes, *so long as it does so independently.*'" 472 U.S. at 601 n.27, 105 S.Ct. at 2856 n.27 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984) (emphasis added)). A firm's right to refuse to deal is unqualified only if it does so independently; a firm which acts in concert with other firms is subject to full Section 1 antitrust scrutiny.[19]

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[19] Visa cites *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), as support for its argument. Visa argues: "Applying the standard that properly governs restrictions on competition *by or among members* to a refusal to share property is, in our view, as inappropriate as treating a 'conspiracy' between a parent and its subsidiary as a conspiracy subject to Section 1." *Visa's Oct. 26, 1992, Memorandum in Support of Motion for Judgment Under Rule 50.*, at 10 (emphasis in original).

The court finds no merit in this argument. *Copperweld* offers no support for Visa's position. *Copperweld* stands for the simple proposition that a parent and its subsidiary constitute a single entity for antitrust purposes. 467 U.S. at 777, 104 S.Ct. at 2744. As such, their activities are not governed by Section 1. The Court focused on the distinction between the

Visa's argument concerning the economic benefits of a joint venture's refusal to deal, as opposed to other joint venture restraints, is not entirely irrelevant to the Section 1 inquiry. In some circumstances, the distinction between the two types of restraints may be important. For example, the distinction may be relevant in the court's determination whether to apply the *per se* illegality presumption. An agreement to limit competition by or among members of the joint venture is more likely to harm competition than is a simple refusal to deal with a competitor. Therefore, intrasystem restraints such as price-fixing or output limitations, are usually struck down as illegal *per se*, whereas simple refusals to deal are more likely to be governed by a complete standard Rule of Reason analysis. *See Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 619 (9th Cir. 1979), *cert. denied*, 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1300 (9th Cir. 1978).

Visa's argument is also relevant to the fact-finder. Under the Rule of Reason, the jury may consider all evidence of harmful and beneficial effects. Economic arguments concerning the preservation of private property incentives may be, and in this case certainly were, presented to the jury as evidence of beneficial effects.

Thus, both the court and the jury may consider the economic implications of a refusal to deal. This argument, however, does not alter the legal standard. All restraints imposed by joint action, whether simple refusals to deal or restrictions on competition among the members, are governed by Section 1's Rule of Reason analysis. What Visa gains from its legal argument is an escape from a finding that Bylaw 2.06 is *per se* illegal, not the opposite result of some form of *per se* non-illegality.

This notion is illustrated in several cases. For example, in *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89

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independent activities of a single entity and the concerted conduct of multiple entities. It found no "joint activity" and therefore Section 1 was not applicable. *Id.* The holding of the case has no application whatsoever to the issue in this case regarding the application of Section 1 to joint venture activity, regardless of the fact that there are different types of agreements among joint venture members.

L.Ed.2d 2013 (1945), the Supreme Court struck down a joint venture's refusal to deal as a violation of Section 1 of the Sherman Act based on a Rule of Reason analysis. There, the Court was called upon to consider whether certain bylaws of the Associated Press, a joint venture, constituted an unreasonable restraint of trade. The bylaws "granted AP members powers to impose restrictive conditions upon admission to membership of non-member competitors." 326 U.S. at 6, 65 S.Ct. at 1418. Thus, similar to the present case, the bylaws allowed members to refuse membership to existing competitors. The restriction constituted a refusal to share property with a competitor. The Court determined that the restraint was unreasonable under Section 1.

The Court rejected the defendant's plea for special treatment based on notions of private property. It stated:

> It has been argued that the restrictive By-Laws should be treated as beyond the prohibitions of the Sherman Act, since the owner of the property can choose his associates and can, as to that which he has produced by his own enterprise and sagacity, efforts or ingenuity, decide for himself whether and to whom to sell or not to sell. While it is true in a very general sense that one can dispose of his property as he pleases, he cannot "go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."; . . . The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible–the collective power of an unlawful combination. That the object of sale is the creation or product of a man's ingenuity does not alter this principle.

Associated Press, 326 U.S. at 14-15, 65 S.Ct. at 1422 (emphasis in original) (citation omitted). The Court did not apply a special "screen" to the refusal to deal, nor did it require a heightened showing of monopoly power or the existence of "essential facilities."[20] Rather, the Court used the Rule of Reason to find the restraint unreasonable.

This case makes it clear that notions of private property and protection of incentives to create are not entitled to special protection from the antitrust laws. Although such notions are important policy considerations and may be important to the factual Rule of Reason inquiry, they may not be used to avoid antitrust scrutiny.

Reazin v. Blue Cross & Blue Shield, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990), is also instructive on this issue. There, an insurance company, Blue Cross, conspired with two hospitals to injure a third hospital which was affiliated with a competitor. Blue Cross terminated its contract with the third hospital and structured its contract with the other two so as to increase the costs of the third hospital. *Id.* at 954-55. The agreement was challenged as an unreasonable restraint of trade under Section 1. The restraint was submitted to a jury for determination under the Rule of Reason. The jury found a violation of Section 1. *Id.* at 955. On appeal, the Tenth Circuit upheld the jury's findings. *Id.* at 972.

The defendant's conduct in *Reazin* is comparable, although not completely analogous, to Visa's conduct in the present case. Like Visa, Blue Cross's conspiracy constituted an exercise of the right to deal and to refuse to deal. No special standards were applied to the restraint despite the fact that the plaintiff hospital was a viable, thriving competitor. The restraint was struck down because it was found to substantially harm competition. Although *Reazin* involved a vertical restraint of trade, the case supports the proposition that a

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[20] *Associated Press* is often referred to as a so-called "essential facilities" case. As discussed in Part I.A.4.c. of this Opinion, *Associated Press* does not involve a facility that was essential to the existence of the non-Associated Press newspapers as rival, on-going concerns. There is no doubt the facility in question–membership in Associated Press–was very important to the plaintiffs, but it was, strictly speaking, not essential.

restraint imposed by a simple refusal to deal is not subject to special treatment, but rather is to be judged by the same standard as all other Section 1 restraints.[21]

Visa's legal argument must fail for another reason as well–it is not applicable to the facts of this case. Even if the court were to grant special legal deference to a simple refusal to deal, Bylaw 2.06 would not qualify for such special treatment. The court finds, contrary to Visa's position, that Bylaw 2.06 is more than a simple refusal to deal. Rather, as Sears argues, Bylaw 2.06 may also be a restriction on intersystem competition in the general purpose charge card market because it prohibits current Visa members from developing their own proprietary cards.[22]

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[21] At the December 22, 1992, motion hearing, Visa pointed out that *Reazin* was distinguishable from the instant case, noting that the two would be analogous if Visa had conspired with merchants to deal only with Visa members and not with Discover. The court agrees that *Reazin's* value here is limited to showing that a Rule of Reason analysis is appropriate in Section 1 refusal to deal cases.

[22] Visa argues that Sears lacks standing to make this argument. Because Sears has apparently suffered no injury from the disincentive aspects of Bylaw 2.06, Visa argues that Sears is prohibited from raising this argument to the court or jury. The issue of Sears' standing and injury is discussed in Part I.C. of this Opinion. Sears properly argued the disincentive aspects of Bylaw 2.06 to the court and the jury. Although standing is required to challenge a given restraint, it is not necessary to have standing as to each alleged harmful effect of the restraint. Sears has standing to bring this action because of its exclusion from the Visa system. A party with proper standing may present evidence as to all anticompetitive effects of the challenged restraint, whether or not it has suffered direct antitrust injury flowing from each effect. The question is actually one of admissibility of the evidence, not one of standing. The court found the disincentive evidence to be clearly relevant to the harmful effects issue. The court further found that its probative value was not outweighed by unfair prejudice or any of the other factors set forth in Rule 403 of the Federal Rules of Evidence.

It is undisputed that Visa intended the restrictions of Bylaw 2.06 to apply to current Visa members as well as non-members.[23] Because of the bylaw, current Visa members who develop successful, competitive proprietary cards are subject to expulsion from the Visa system. Sears argues that this imposes a substantial disincentive for Visa members to develop competing proprietary cards. As such, Visa is not simply refusing to share its property with competitors, it is limiting the way in which its own members may compete within the general purpose charge card market. Such a restriction might be likened to a scheme to fix prices, or to limit output to geographical areas. It is an agreement by multiple entities to limit the way in which they compete with each other. It is true that Visa members compete as to price and output of Visa cards within the system. However, Bylaw 2.06 arguably prohibits, or at least substantially hinders, potential intersystem competition by Visa members who may wish to issue their own proprietary cards.

The disincentive aspect of Bylaw 2.06 is somewhat analogous to the restraint discussed in *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). There, the National Football League, a joint venture comprised of professional football teams, enacted a rule forbidding its members from obtaining or retaining ownership of any other professional sports team in any other league. *Id.* at 1250. The rule, while allowing for intrasystem competition within the league, restricted the ability of league members to engage in intersystem competition in the relevant market.

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[23] Although such an interpretation of Bylaw 2.06 is not apparent on its face, Visa has made it clear that the bylaw applies to current members as well as new applicants. Furthermore, after the amendment to Bylaw 2.06 was passed, Visa later amended Bylaw 2.10, to directly prohibit all current Visa members from issuing other proprietary, competitive cards. This issue is discussed further in this court's ruling on Sears' Motion for an Order Enforcing its Rights Under Federal Banking Law. 784 F. Supp. 822, 832-34 (D. Utah 1992).

The restraint was struck down as a violation of Section 1, pursuant to the Rule of Reason.[24] *Id.* at 1261.

In conclusion, Visa's arguments concerning private property and the right of refusal to deal must fail for two reasons: A joint venture's private property rights are not subject to special legal treatment under the antitrust laws, and Bylaw 2.06 is not a simple refusal to deal.

b. Joint Ventures Under the Antitrust Laws

The next principle of Visa's legal argument goes to the manner in which joint ventures are treated under the antitrust laws. Visa argues that because of the beneficial aspects of joint ventures, they should be given deferential treatment.

Visa first emphasizes the economic benefits of a joint venture. A "true" joint venture, it is argued, is one in which single firms join together to create products. The combining of efforts gives the joint venture sufficient size and power to accomplish tasks which could not be accomplished by a single firm individually. Thus, it is argued, joint ventures are beneficial to consumers.

Visa also stresses that joint ventures are economically preferable to outright mergers. Members of a joint venture retain their individual identities, and are free to compete between and among themselves. A merger, on the other hand, results in a large, single entity which has no real competition within itself. Thus, a joint

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[24] Such restrictions often trigger *per se* illegality presumptions. However, as discussed in Part I.A.1.b. of this Opinion, the *per se* presumption may not be proper when the restraint has the potential for legitimate, beneficial effects, or if it is necessary for the product to be available at all. *See North American Soccer*, 670 F.2d at 1259.

Thus, although it could be argued that Bylaw 2.06 is subject to the *per se* illegality presumption, the court has found the presumption is not proper in this case. Visa has presented substantial evidence and argument as to the beneficial aspects of Bylaw 2.06. Accordingly, the reasonableness of the bylaw should be determined by the jury under the Rule of Reason.

Sears has apparently conceded this point. It has not argued for a *per se* illegality declaration by the court. Rather, it agrees with the court's decision to submit the claim to the jury.

venture retains many aspects of competition, whereas an outright merger eliminates all intrasystem competition.

Based on this analysis, Visa submits that "the antitrust laws give joint ventures *more*, not less, leeway than independent entities in their conduct." *Visa's Oct. 26, 1992, Memorandum in Support of Motion for Judgment under Rule 50*, at 11 (emphasis in original) (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1979)). Visa asserts that holding joint ventures subject to strong antitrust scrutiny is harmful to consumers. Applying a strict standard to joint ventures, it is argued, discourages the incentive to create joint ventures. This disincentive leaves potentially beneficial projects to be undertaken (if undertaken at all) by smaller, less-efficient single firms, or results in outright mergers which eliminate all competition between the merging firms. *See Visa's Nov. 24, 1992 Mem.*, at 19 n.16.

Visa asserts that the Visa joint venture is a true, product-creating joint venture in which "its members have come together to create a new product, through risk and innovation, that none of its members could have created individually." *Id.* at 11. Visa's formation as a joint venture, it is argued, has therefore been beneficial to consumers. As such, the activities of the joint venture should receive greater leeway under the antitrust laws.

Visa's argument on this point raises legitimate policy considerations. It sounds logical and well-reasoned. It suffers, however, from one flaw–it is entirely inconsistent with the law. "The theory that a combination of actors can gain exemption from § 1 of the Sherman Act by acting as a 'joint venture' has repeatedly been rejected by the Supreme Court." *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1257 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). Joint ventures are treated differently from single entities under the antitrust laws based on the very structure of the Sherman Act. "[T]he Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775, 104 S.Ct. 2731, 2744, 81 L.Ed.2d 628 (1984).

Section 1 applies only to "contracts, combinations and conspiracies," or in other words, joint activity. It has no effect whatsoever on a single firm that acts alone. A single firm, acting independently, can restrain trade in any manner without violating Section 1. Unless it runs afoul of the monopoly prohibitions of Section 2, it is immune from antitrust scrutiny.[25]

The distinction between Sections 1 and 2 is important. When firms act in concert, they are subject to scrutiny under both sections. *See Copperweld*, 467 U.S. at 774-75, 104 S.Ct. at 2743. Because joint ventures, by their very nature, engage in combined activity, their conduct is continually subject to antitrust scrutiny under Section 1. The law is not unclear in this regard. The United States Supreme Court explains this issue thoroughly in *Copperweld*:

> Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily disappoint those who find the distinction arbitrary. It cannot be denied that § 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such–but only restraints effected by a contract, combination, or conspiracy–it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.

467 U.S. at 774-75, 104 S.Ct. at 2743-44 (citation omitted).

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[25] Section 2, of course, applies to all entities, whether acting alone or in concert. No entity, or group of entities, may act to monopolize or attempt to monopolize without violating Section 2. Thus, the Sherman Act makes a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984).

Regardless of Visa's policy arguments, the simple fact of the matter is that joint ventures are subject to Section 1's Rule of Reason. This is the structure of the Sherman Act. The structure may be arbitrary. It may or may not be economically unsound. It is, however, the law.

This is not to say that a joint venture's status as a legitimate, product-creating venture is not relevant to the Rule of Reason analysis. This argument, similar to Visa's private property argument, may be presented to the jury under the Rule of Reason.[26] The nature and purpose of the joint venture is highly relevant to the issues of anticompetitive intent and effect.

The argument is also relevant to the court's determination whether to apply *per se* illegality. As discussed in Part I.A.1.b. of this Opinion, under certain circumstances, activities which otherwise would be declared illegal *per se* may be spared the presumption and submitted to a jury for Rule of Reason inquiry. When the restraint has an arguable legitimate purpose or effect, or if the restraint is such that it is necessary for the product to exist at all, *per se* analysis is improper. Joint ventures often escape the *per se* illegality presumption on these grounds. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-98, 105 S.Ct. 2613, 2620-21, 86 L.Ed.2d 202 (1985); *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 100-01, 104 S.Ct. 2948, 2959-60, 82 L.Ed.2d 70 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d

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[26] Applying this analysis to the present case, Visa's expert witness, Professor Richard Schmalensee, stated at trial:

> [I]t makes no more economic sense to require Visa to share its property with Discover, because it is an association of 6,000 people, than it would make to require Discover to share its property with others simply because it has been selfish in some sense and not shared at all. Neither kind of reasoning makes sense.

(Tr. at 2275). This is a proper economic factual argument, but it does not reinvent the meaning of Section 1. Unless Discover possesses monopoly power, as a single business it is not required to share its property.

1 (1979); *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1259 (2d Cir. 1982).

Thus, the existence of a joint venture may save an otherwise facially pernicious restraint from *per se* illegality, in favor of a jury's factual Rule of Reason analysis. In this limited respect, joint ventures receive greater leeway than single firms which combine and conspire to restrain trade.

This point is illustrated by *Broadcast Music*. There, a joint venture's price-fixing restraint was such that it ordinarily would have been declared illegal *per se*. The court, however, refused to declare the restraint illegal *per se*, but rather, submitted it to "a more discriminating examination under the rule of reason." 441 U.S. at 24, 99 S.Ct. at 1565. The court found the *per se* presumption improper because the restraint imposed by the joint venture was necessary for the product to be available at all. *Id.* at 23, 99 S.Ct. at 1564.

Visa's reliance on *Broadcast Music* as support for its legal argument is misplaced. *Broadcast Music* merely stands for the proposition that joint ventures may escape the *per se* presumption. Contrary to Visa's position, there is no special treatment or "screen" given to efficiency-enhancing joint ventures that would justify dismissing Sears' claim as a matter of law.

c. . "Essential Facilities" as a Legal Requirement

The final aspect of Visa's economic argument is that under the circumstances of this case, a showing of essential facilities is required as a matter of law. Visa asserts that this heightened standard is warranted on the basis of its two economic arguments. When a joint venture does nothing more than to refuse to share its property with a competitor, Visa argues, the excluded competitor has no antitrust claim–absent essential facilities. Accordingly, Visa asserts that for Sears to prevail, it must show that membership in Visa is essential to Sears' existence in the relevant market.

Sears clearly cannot make such a showing. Sears is a successful competitor in the relevant market. It does not need membership in Visa in order to compete in the general purpose charge card market. Through the Discover Card, Sears has shown the ability to compete successfully outside of the Visa system. Visa argues, therefore, that

Visa's exclusion of Sears cannot be an antitrust violation and Sears as a matter of law, cannot prevail on its claim.

It is Visa's claim, however, that fails as a matter of law. There is nothing in the antitrust laws which requires Sears to meet a heightened standard of a showing of essential facilities in order to receive a jury trial. A showing of essential facilities is never required as a matter of law. The standard which applies to Sears is exactly the same standard applied to all plaintiffs in Section 1 cases–the plaintiff must show that the restraint substantially harms competition in the relevant market and that it has suffered antitrust injury therefrom. The plaintiff need not show that the restraint destroys its ability to compete. Rather, it need only show that the restraint harms competition and consumers. Because a restraint may substantially harm competition without eliminating the competitor, a plaintiff may prevail under Section 1 without proving essential facilities.[27]

This is not to say that a showing of essential facilities is not relevant under the Rule of Reason. Although essential facilities is not required as a legal matter, it may be extremely important as a factual matter. Certain restraints may be such that they will not be found unreasonable under the antitrust laws unless a showing of essential facilities is made. When a plaintiff is excluded from a facility which is necessary to compete, it is more likely the exclusion is unreasonable. The more essential the facility, the more likely a duty to share will be imposed. The determination, however, is made by the trier-of-fact under the Rule of Reason.

Visa relies on several cases in support of its essential facilities argument. *United States v. Terminal Railroad Association*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912), is the leading so-called "essential facilities" case. There, the defendants, by virtue of their control of several bridges over the Mississippi River, controlled every reasonable means of railway access into and out of the city of St. Louis. The United States brought suit under the Sherman Act to compel defendants to share access to the bridges with their

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[27] Of course, the plaintiff must establish that it has suffered antitrust injury from the restraint. This does not require, however, a showing of inability to compete. A showing of negative impact on the ability to compete is sufficient.

competitors. Those excluded from use of the bridges were effectively shut out of the market. Thus, defendants controlled an essential facility for competition in the market. *Id.* at 397, 32 S.Ct. at 510. The Court imposed a duty to share access to the bridges, based upon both Sections 1 and 2 of the Sherman Act. Because railway access was essential for competition, the Court held that the exclusion of competitors constituted a combination in unreasonable restraint of trade. *Id.* at 411-12, 32 S.Ct. at 516.

This holding, however, does not support Visa's position. The case stands for the simple proposition that the existence of essential facilities may result in the imposition of a duty to deal. This does not mean, however, that a showing of essential facilities is required before a duty to deal will be imposed.

Similarly, in *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), newspapers excluded from membership in the Associated Press sought access to the association. The exclusion from membership caused the excluded parties to suffer harm, "hindered and impeded the growth of competing newspapers," and set excluded parties at a "competitive disadvantage." *Id.* at 12, 18, 65 S.Ct. at 1420, 1423. It did not, however, destroy their ability to compete. Many of the excluded newspapers had been and were able to compete in the market without membership in the Associated Press system. Thus, membership was not "essential," and certainly not as important as the bridges at issue in *Terminal Railroad*.

Despite the fact that membership in Associated Press was not "essential," the exclusion was struck down as a violation of Section 1. As in *Terminal Railroad*, the importance of the facility in *Associated Press* was a major, if not the controlling, factor in the fact-finder's determination that the defendants' joint agreement was an unreasonable restraint of trade. Neither case, however, stands for the proposition that without a showing of essential facilities, a plaintiff's case must be dismissed as a matter of law.

Many antitrust refusal to deal cases brought under Section 1 are maintained by plaintiffs who are viable competitors in the relevant market. In *Reazin v. Blue Cross & Blue Shield*, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed. 2d 752 (1990), a competing hospital was successful in its Section 1 claim,

even though it had been, and continued to be, a successful competitor in the relevant market. Therefore, a contract with Blue Cross was not an essential facility necessary for the hospital to successfully compete. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-98, 105 S.Ct. 2613, 2620-21, 86 L.Ed.2d 202 (1985), the plaintiff was a viable competitor and no essential facilities were established, yet its Section 1 suit was allowed to proceed. *See also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 455-56, 106 S.Ct. 2009, 2016, 90 L.Ed.2d 445 (1986) (dentists' refusal to cooperate with insurers' request for X-rays did not involve essential facilities but did withhold particular desirable service from customers); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30, 104 S.Ct. 1551, 1567, 80 L.Ed.2d 2 (1984) (anesthesiologist bringing Section 1 action a viable competitor); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1332-33 (9th Cir.), *cert. denied*, 479 U.S. 851, 107 S.Ct. 180, 93 L.Ed.2d 115 (1986) (veterinarians bringing counterclaim did not possess dominance in the relevant market nor did they control an essential facility).

The case law indicates that a showing of essential facilities is not required for a plaintiff to prevail under Section 1. Visa has failed to show any reason for the imposition of a higher standard for Sears' exclusion. The exclusion, therefore, was properly tried to the jury under the Rule of Reason.

d. Summary and Conclusion of Visa's Economic Legal Argument

In summary, the economic principles upon which Visa relies do not support its argument for judgment as a matter of law. There are no legal principles granting antitrust immunity to a joint venture for its refusal to share its property. Such a refusal is subject to the same standard which governs other combinations in restraint of trade–Section 1's Rule of Reason.

These economic arguments may be highly relevant to the reasonableness inquiry. They may be strong and persuasive evidence of the lack of anticompetitive effects. The jury is free to consider such evidence when weighing the benefits and harms of a given

restraint.[28] If a refusal to deal actually benefits, rather than harms, competition, it will presumably be upheld by the jury's verdict.

Visa submits that such a system is poor economic policy. Imposing joint venture conduct to a jury's Section 1 scrutiny, it is argued, harms consumers and competition. Every action undertaken by a joint venture is potentially subject to a Section 1 challenge. The defense of such a challenge can be very costly–especially when a jury trial is involved. Under the present system, unless a shorthand presumption is used to dismiss the claim, the case must go to trial. An antitrust defendant, even if eventually successful, must expend significant time and resources in defending against the claim.

According to Visa, this threat of antitrust litigation acts as a disincentive to the creation of joint ventures. No matter how beneficial a joint venture may be, firms will be hesitant to combine for fear of exposure to antitrust liability. Unless Visa's legal arguments are adopted and joint ventures such as Visa are shielded from Rule of Reason jury trials, Visa argues, consumers will be deprived of the benefits which otherwise could have been achieved through the pooling of efforts in joint ventures.

The court recognizes that such a system may or may not produce detrimental effects. However, such is the present legal system imposed by the Sherman Act. The determination of policy was made in 1890 by the United States Congress when it enacted the Sherman Act. Congress determined that concerted action in restraint of trade would be subject to antitrust scrutiny. It provided that challenged restraints will be subject to litigation. It made no exceptions for joint ventures, or for refusals to deal.

Visa's arguments would shield potentially anti-competitive behavior from antitrust scrutiny. Such arguments are not properly made to the court. Policy arguments may not be used to contradict or alter the law. As explained by the United States Supreme Court:

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[28] In the present case, Visa presented its economic arguments to the jury in considerable detail. The jury presumably considered all of Visa's arguments when making its determination of the unreasonableness of Bylaw 2.06.

> The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason.

National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689-90, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 (1978) (footnote and citations omitted). Policy arguments, no matter how persuasive, which seek to shield concerted conduct from antitrust scrutiny are of no practical effect when addressed to the court as the grounds for dismissal as a matter of law.

Visa's policy arguments should be directed to Congress rather than the court. It is not the role of this court to alter the law in order to establish what the court may or may not feel is "proper" economic policy. If the structure of Section 1 is arbitrary, unfair, or harmful to consumers, changes should be made by Congress through exemption, amendment, or repeal. "[W]hen Congress has desired to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation." *Associated Press v. United States*, 326 U.S. 1, 14, 65 S.Ct. 1416, 1421-22, 89 L.Ed. 2013 (1945). It is not the province of the judicial branch to alter the law as established by Congress.[29]

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[29] At trial, Visa's expert witness, Professor Richard Schmalensee, stated he had been involved in drafting a legislative proposal aimed at joint ventures created for the purpose of research and development. (*See* Tr. at 2276-78). This proposal addressed an antitrust exemption to allow separate companies to pool their efforts into research and development joint ventures, thereby obtaining greater efficiencies, without the constant threat of being declared illegal *per se*. This exemption from the antitrust laws was sought from the legislative branch, not the judiciary.

Arguments made to Congress in favor of the exemption were similar to those Visa makes here: every joint research and development effort by two or more firms, no matter how desirable for competition and consumers, was subject to a Section 1 lawsuit and a possible finding of *per se* illegality. Competitors not involved in the joint research and development venture,

In conclusion, Visa's economic arguments were properly made to the jury under the Rule of Reason. They may be properly raised before Congress in considering new legislation. They are not, however, based upon current law, sufficient to support judgment in Visa's favor as a matter of law.

B. Visa's "Factual Argument"

Having rejected Visa's legal argument for judgment as a matter of law, the court now turns to Visa's factual argument. This argument is slightly different in nature from the legal argument, but it is based on essentially the same facts. Visa asserts that the facts of this case are so lacking that no reasonable jury could have returned a verdict in support of Sears' Section 1 claim.

At the outset, the court acknowledges that its view of the evidence differs from the jury's findings. If the court had been the fact-finder under Sears' Sherman Act claim, it would most likely not have concluded that keeping Sears out of the Visa system substantially harms competition in the relevant market. In fact, the court would have concluded that the harm to competition from letting Sears into the Visa system is greater than any harm from keeping Sears out. If it had been the fact-finder, the court would have been inclined to find no net harm to competition from Bylaw 2.06.

The court feels this acknowledgement is helpful and appropriate under the unique circumstances of this case. Visa's Clayton Act counterclaim was tried to the court in equity. Accordingly, the court

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therefore, had every incentive to file such a suit. It was asserted that this threat of litigation and *per se* illegality was hindering American progress, and was one reason America was lagging behind other countries in certain economic respects. The proponents of the proposed bill argued that without the threat of *per se* illegality, more American firms would combine money and talent for joint research and development projects. S. Rep. No. 427, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3105.

The result of this effort was passage of the National Cooperative Research Act of 1984. 15 U.S.C.A. § 4301 *et. seq.* (Supp. 1983 to 1991). It took an exemption specifically enacted by Congress to achieve the desired antitrust relief in the research and development area. No court has the power to grant such an antitrust exemption.

was required to conduct a thorough factual review of the relevant market. In that regard, the court as a fact-finder was obligated to determine whether allowing Sears, the owner of the Discover Card, to also be a Visa member may substantially lessen competition in the relevant market within the meaning of Section 7 of the Clayton Act. The court's factual inquiry involved consideration of all the relevant economic and policy issues considered by the jury in connection with Sears' Sherman Act claim. As a result, the court's inquiry on the Clayton Act counterclaim is in significant respects the opposite of the jury's inquiry on the Sherman Act claim. Whereas the jury was asked to determine whether it violated the Sherman Act for Visa to keep Sears out, the court was asked whether it violated the Clayton Act to let Sears in. Accordingly, hereafter in Part II of this Opinion, the court performs its Clayton Act fact-finding role. Its factual conclusions are identical to those it gratuitously expresses here. The one and only reason the court does so at this point is to emphasize and strengthen the court's decision that notwithstanding the factual attitude of the trial judge, Sears' evidence as to the Sherman Act was reasonable, credible and capable of supporting the verdict reached by the jury.

Specifically, as explained more fully in its Clayton Act discussion, the court believes that Bylaw 2.06 fosters intersystem competition in the relevant market. Such competition is important in the general purpose charge card market, with only five active intersystem competitors (Visa, MasterCard, American Express, Discover, and Diners Club/Carte Blanche). Simply adding another high-priced card issuer, as Sears has always been with both the Discover Card and the Sears charge card,[30] to the Visa system will not solve the problem. It may provide short-term intrasystem competitive benefits within the Visa system, but in the long run, in the court's judgment, the damages from such inclusion will outstrip the benefits. Eventually, consumers will be left with one more top-ten Visa issuer charging relatively high interest rates and a

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[30] The evidence showed that as of the time of trial, the Discover Card had never charged less than a 19.8% annual percentage rate, the only general purpose charge card never to have charged a lower rate. The Sears Charge card used at Sears retail stores has historically charged an annual percentage rate of approximately 21%.

Visa/MasterCard system which will dominate the general purpose charge card field to an even greater extent than it does today.

In addition, the court found Visa's policy and economic arguments to be the more compelling. As a factual matter, the court found persuasive Visa's positions regarding the need to protect joint venture innovation, the importance of protecting private property, and the economic and competitive consequences of keeping the owner of the Discover Card out of the Visa system. The court found Visa's expert witness, Professor Richard Schmalensee, more compelling than Sears' expert witness, Professor James Kearl, and was persuaded by Visa's industry expert, Mr. Robert McKinley. Visa's general counsel, Mr. Bennett Katz, provided what the court felt was helpful and persuasive evidence regarding the various business reasons why Visa preferred to keep Sears out of the Visa system.[31] The court does not see the proposed Prime Option Visa card as the low-cost boon to consumers that it is touted to be. In short, the court does not see the facts Sears' way.

The court's factual attitude, however, does not require an overturning of the jury's findings as a matter of law. The fact that the court may have ruled differently than the jury on the Sherman Act does not warrant the granting of Visa's Rule 50(b) Motion for Judgment as a Matter of Law. It would be inappropriate for the court to wrongly "'substitute its judgment for that of the jury.'" *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988) (quoting *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d

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[31] Regardless of the intent and motivation of Visa's member banks in passing Bylaw 2.06, Mr. Katz, as Visa's chief legal officer, expressed concern about government regulation if Visa were to grow significantly larger. Mr. Katz explained that if Sears were to become a Visa member and as a result the Discover Card became less of a competitive force, the federal government may well impose more intrusive regulations on the Visa association or even require a dissolution or break-up of some kind. It is a credible concern for a business in our free enterprise system to worry about being run by the government, whether through the enactment of legislative controls, executive branch administration, or perhaps worst of all, judicial branch scrutiny and approval of its every move.

1166, 1171 (10th Cir.), *cert. denied*, 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985)).

The standard to be applied by the court under Rule 50(b) is not based upon the court's factual findings. Rather, the standard is whether "there is no legally sufficient evidentiary basis for a reasonable jury to have found for (the non-moving) party with respect to that issue." Fed.R.Civ.P. 50. A judgment as a matter of law is "appropriate only when 'the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made.'" *Prudential Federal*, 763 F.2d at 1171 (quoting *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974)). It is clear from the case law in this circuit that in analyzing a Rule 50(b) motion, the court is "obligated to view 'evidence and inferences most favorably to the nonmoving party'". *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990), *cert. denied*, __U.S.__, 111 S.Ct. 1685, 114 L.Ed.2d 80 (1991) (quoting *Zimmerman v. First Fed. Sav. & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988)). "[T]he court must view the evidence and indulge all inferences in favor of the party opposing the motion and 'cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury.'" *Lucas*, 857 F.2d at 1400 (quoting *Prudential Federal*, 763 F.2d at 1171). Judgment as a matter of law is appropriate if the court finds no reasonable evidence to support the verdict or if "the verdict is supported only by sheer speculation and conjecture." *Ware v. Unified Sch. Dist. 492*, 881 F.2d 906, 911 (10th Cir. 1989), *modified*, 902 F.2d 815 (10th Cir. 1990).

1. Market Power

The court has previously determined that the evidence was sufficient to support a finding that Visa members *possess* market power in the relevant market.[32] Pursuant to the court's instructions, the jury determined that Visa members collectively possessed market power and that the enforcement of Bylaw 2.06 constituted an exercise of that market power. Visa argues that the jury erred in this finding. It submits that no reasonable jury could find, from the evidence presented at trial, that Bylaw 2.06 is an exercise of market power.

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[32] *See* Part I.A.2. of this Opinion, *supra*.

Visa argues that Bylaw 2.06 is an action by the Visa members in their individual, rather than collective, capacities. Because the Visa system includes approximately 6000 members, Visa argues, no one single member has the ability to exercise market power. Therefore, Visa submits, it is only through collective action that Visa members would be able to exercise market power. Visa asserts that Bylaw 2.06 is not collective action because it allows Visa members to continue to compete individually between and among themselves as to price and output. Visa explains that unless its "members pass rules limiting price or output among themselves, their ability to exercise market power remains a function of their *individual* market shares . . . ." *Visa's Nov. 24, 1992, Mem.*, at 36 (emphasis in original). In other words, Visa submits that only restraints on trade between and among members of the joint venture may constitute an exercise of collective market power.

Sears argues, on the other hand, that Bylaw 2.06 is a collective exercise of market power. Sears asserts that although the bylaw does not expressly restrict competition as to price or output between and among Visa members, it does so indirectly. By excluding a large, low-cost competitor such as Prime Option from the Visa system, the bylaw shields current Visa members from vigorous competition. Although there is competition among the current members, Sears argues that competition is not as strong as it could be. This situation, Sears argues, allows the large banks to maintain high prices and profits at the expense of the consumer. Therefore, Sears claims, Bylaw 2.06 is a collective effort by Visa members to limit competition within the system.

This assertion was supported by evidence at trial. Sears offered the testimony of its expert witness, Professor Kearl, who testified that the 72% combined market share held by Visa and MasterCard is important in determining that Visa members have market power and are able to exercise that power through association rule-making. Professor Kearl further testified that because the collective rule-making directly affects such a large share of the market, Visa members have significant incentive and ability to keep interest rates and profits high. In addition, he asserted that the presence of proprietary cards such as the Discover Card has not stopped Visa members from exercising their collective rule-making power to the

detriment of consumers. Professor Kearl testified that further evidence of Visa's market power is the fact that Visa members, especially its top-ten issuers, have continuously enjoyed high profits for many years.

Visa claims that Sears' evidence was insufficient and no reasonable jury could have based a verdict on this evidence. First, Visa attacks the qualifications of Professor Kearl, claiming that he lacks the education and experience to be credible as an expert witness in this particular area of economics. The court finds this argument to be untimely and without merit. Visa failed to challenge Professor Kearl's qualifications during the trial. He was allowed to give his opinions without objection by Visa. Visa also subjected him to thorough cross-examination. Once an expert is qualified, especially without objection, it is not the province of this court to judge the witness's credibility or to determine which expert should be believed. "It remains the duty of the jury to evaluate the testimony of expert witnesses, just as all other witnesses, and to reach conclusions as to its worth and weight. Our entire system is anchored to the jurors' determination of credibility of witnesses and the weight to be given their testimony." *Moe v. Avions Marcel Dassault-Brequet Aviation*, 727 F.2d 917, 929-30 (10th Cir.), *cert. denied*, 469 U.S. 853, 105 S.Ct. 176, 83 L.Ed.2d 110 (1984). With no objection at trial as to Professor Kearl's qualifications as an expert, this court will not now step into the jury's domain and disregard or exclude his testimony.

Visa next attacks the findings and conclusions made by Professor Kearl. Visa asserts that Professor Kearl's testimony regarding collective rule-making and the appropriateness of aggregating the shares of Visa and MasterCard members is incorrect. Visa relies on the testimony of its own expert, Professor Schmalensee, who stated that Bylaw 2.06 is not an exercise of market power by the Visa members.

Under Rule 50(b), the court must determine whether the testimony presented by Professor Kearl and the other evidence presented by Sears was such that a reasonable jury could have relied on it in finding an exercise of market power by Visa. The court concludes that the jury could have so found. It was not unreasonable for the jury to believe Professor Kearl's testimony and to conclude

that in the aggregate, Visa members possessed and exercised market power. His testimony regarding the collective rule-making power of Visa members and the presence of high profits is supported by evidence that the largest members of Visa have been very slow in responding to price competition from smaller Visa members and new entrants. This testimony was supported by Mr. McKinley, Visa's own industry expert, who acknowledged that the large Visa and MasterCard issuers continue to charge high interest rates even though many smaller issuers, such as locally-owned savings and loan associations, have lowered their interest rates significantly. All of this evidence could have persuaded the jury that Visa members possessed and exercised market power in passing Bylaw 2.06.

2. Harmful Effects

Visa attacks the jury's finding that Bylaw 2.06 has substantially harmful effects on competition. Visa claims that based on the evidence presented at trial, no reasonable jury could have so concluded. As explained in the Background section of this Opinion, Sears presented evidence that Bylaw 2.06 harms competition by preventing Sears' low-cost Prime Option Visa card from entering the market, and by creating a disincentive for the creation of new proprietary cards. Visa attacks Sears' disincentive evidence by asserting that it is based merely on speculation. Visa asserts that there is no direct evidence suggesting that Bylaw 2.06 has deterred anyone from offering a new general purpose charge card. The court does not agree.

First, this is a common sense argument. Evidence showed that a Visa membership can be highly profitable. It is reasonable to argue that no firm will enter the general purpose charge card market with a new proprietary card if it risks losing its Visa membership. This common sense conclusion was supported by specific evidence presented at trial. Dean Witter's President, Phillip Purcell, testified that Sears would not have developed its proprietary Discover Card had it known that such a move would disqualify it for membership in Visa. The evidence also showed that no entity has created a new proprietary card since the passage of Bylaw 2.06. In contrast, during the same period, many entities have joined the Visa and MasterCard systems. Finally, Visa's own internally-prepared document lists no

fewer than twenty-one Visa members whom Visa views as potential competitors with the capacity to issue their own proprietary cards. (Pl.'s Ex. 297). Based on this evidence, the court finds that a reasonable jury could have found harmful effects on competition based on Sears' disincentive evidence.

Next, Visa argues that the evidence was insufficient to support a finding that excluding Sears' Prime Option Visa card from the market had a harmful effect on competition. Visa asserts that because competition is vigorous between the 6000 Visa members, the exclusion of one more member in the association is insignificant. Again, the court does not agree that Visa's argument was so compelling that a reasonable argument to the contrary was not possible.

Sears presented evidence that the addition of Prime Option Visa to the Visa system would be substantially beneficial to competition. There was testimony that Prime Option would be a low-cost card[33] which would be supported by powerful marketing and advertising strategies on a national level. While smaller Visa issuers may offer lower interest rates, such firms do not have the marketing muscle of Sears. Furthermore, while most of the top-ten Visa issuers provide lower-cost cards to some of their customers, Prime Option's favorable terms would be available to all of its customers. Based on such evidence, it was not unreasonable for the jury to find that the exclusion of Sears was harmful to competition.

3. Beneficial Effects

Visa has enumerated various beneficial effects it claims Bylaw 2.06 has on competition. This argument is essentially identical to Visa's previous legal argument based on economic principles and policies. First, Visa asserts that Bylaw 2.06 should be upheld because the protection of property rights is essential to encourage innovation and risk-taking in business. Second, Visa argues that the

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[33] At the time of trial, Prime Option Visa's terms anticipated a 25-day grace period for all card holders, a 9.9% rate of interest on the current and the previous month's purchases and a rate of 9.9% plus the Prime Rate on older purchases. In addition, there is no annual fee, a periodic skip-a-payment, and a standard opening credit line of $3500.

protection of incentives for the creation and maintenance of joint venture property is also a reason to uphold Bylaw 2.06. Given these compelling policy considerations, Visa claims no reasonable jury could have concluded that the harmful effects of Bylaw 2.06 substantially outweigh the beneficial effects.

Just as the court rejected Visa's legal argument on this point, it rejects the assertion that Visa's policy arguments are so compelling that no reasonable fact-finder could have found to the contrary. As a factual matter, the jury did not accept Visa's arguments as dispositive. The court does not know whether the jurors simply discredited the evidence presented on these issues or whether they found that the benefits to competition were outweighed by the harmful effects. In either case, however, it was the jury's prerogative to weigh the evidence.

Visa also argues that an additional benefit to competition from Bylaw 2.06 is the preservation of competition at the intersystem level. Visa argues that the intersystem market is already highly concentrated with only five system-level competitors: Visa, MasterCard, Discover, American Express and Diners Club/Carte Blanche. If Sears were to join the Visa system, Visa argues that competition between Discover and Visa will decrease, thereby affecting competition on the intersystem level.

Visa points out that as a result of duality, there is no significant intersystem competition between Visa and MasterCard. Visa argues that this lack of competition is indicative of what will happen to competition between Discover and Visa if Sears is allowed to issue Prime Option. Visa attempted to articulate this point at trial, presenting evidence regarding the effects of duality and the possibility of a similar occurrence if Sears were allowed to become a member of Visa.

Visa also claims that the Discover Card will be less viable as an intersystem competitor for various other reasons. Witnesses explained how they feared Sears would put less time and money into improving Discover, and that Discover's top executives would be reassigned to Prime Option Visa. In addition, testimony was offered to suggest that Sears, as a Visa member, may choose to implement new and improved features with Prime Option Visa but not with the

Discover Card. Any or all of these possibilities, Visa claims, will eventually lead to the demise of the Discover Card, thereby decreasing competition on the intersystem level.

Sears presented evidence to contradict Visa's assertions. Most important was testimony supporting Sears' contention that the Discover Card would continue to be a viable competitor in the general purpose charge card market. First, Sears asserted that Visa's duality analogy was inappropriate because Prime Option Visa was designed to reach that part of the market that Discover does not reach.[34] Furthermore, Sears claimed that it had no desire to convert Discover to a Visa card because Discover has been, and continues to be, a very successful, money-making venture.

In assessing each of Visa's arguments concerning the competitive benefits of Bylaw 2.06, the court concludes that a reasonable jury could have determined that the harmful effects on competition substantially outweigh any beneficial effects. The court cannot find, as a matter of law, that the jury erred in making its determination.[35]

4. Antitrust Injury

Visa asserts that Sears has not suffered any antitrust injury as a result of Bylaw 2.06. First, Visa argues that Sears has not been injured because Sears' inability to issue a Prime Option Visa card has not prevented Sears from competing in the market generally. In addition, Visa asserts that Sears is capable of offering a card with

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[34] Sears presented credible evidence that the Discover Card has more appeal to persons who tend to promptly pay their credit card balances, referred to in the industry as "transactors," than it has to persons who carry credit card balances from month to month, referred to in the industry as "revolvers." Visa and MasterCard are used primarily by revolvers. Prime Option Visa is designed to appeal to revolvers, rather than transactors, and in that sense is not expected to be in direct competition with the Discover Card.

[35] Again, the court notes that it was possible that the jury found all of Visa's arguments concerning intersystem competition persuasive. However, the jury may still have concluded that the harms to competition substantially outweighed the benefits.

Prime Option's features as a different version of the Discover Card or as an independent proprietary card. Visa contends that the only "benefit" Sears has been denied is that Sears is unable to capitalize on the value attributable to Visa's trademarks, systems, and merchant base.

Sears argues, on the other hand, that it suffered antitrust injury as a result of Bylaw 2.06, regardless of its decision not to launch Prime Option independent from the Visa system. At trial, Sears presented evidence that issuing Prime Option as a separate proprietary card would not have been as profitable as issuing a Prime Option Visa. Sears argues that the most effective business plan was to pursue its multi-card strategy–issuing Discover as a proprietary card, and Prime Option as a Visa card. Mr. Purcell, president of Dean Witter, testified that if he had known Visa would change its rules not to allow Sears to issue both a national proprietary card and a national Visa card, he would not have supported the idea to issue Discover first and then issue a Visa card or MasterCard card.

The court finds that Sears presented sufficient evidence at trial from which a reasonable jury could find that Sears suffered antitrust injury as a result of Bylaw 2.06. The fact that Sears could have perhaps reduced its injury by issuing Prime Option outside the Visa system does not mean it suffered no antitrust injury. If Visa's action resulted in a restraint of trade, it is not a defense to argue that no injury would have resulted if Sears had simply decided not to challenge the bylaw and instead issued Prime Option independently. *See Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 754 F. Supp. 1336 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir.), *cert. denied*, __U.S.__, 113 S. Ct. 409, 121 L.Ed.2d 334 (1992) (trial court held that when restraint of trade is found, it is no defense if injury could have been avoided by signing a different contract or striking a different bargain).

The evidence at trial indicates that Sears would benefit significantly from issuing Prime Option Visa as opposed to Prime Option Discover or another separate proprietary card. Sears presented sufficient evidence for the jury to determine that Sears was injured because it was prevented from issuing the Prime Option Visa card.

Based on the foregoing the court finds that the jury could have reasonably found that Bylaw 2.06 is an unreasonable restraint of trade in the general purpose charge card market and that Sears suffered antitrust injury as a result. Visa's factual argument based on Rule 50(b) is denied.

C. Sears' Disincentive Evidence: Standing & Injury

In an argument somewhat related to the injury issue discussed in the foregoing section, Visa asserts that the court erred in allowing Sears to present its disincentive evidence to the jury. Visa submits that Sears suffered no injury from the alleged disincentive aspects of Bylaw 2.06, and therefore lacked standing to present such evidence.

The court agrees that the disincentive argument apparently does not apply to Sears. Sears argued that Bylaw 2.06 acts as a disincentive to the creation of new proprietary cards by threatening exclusion or expulsion from the Visa system. Sears presumably did not suffer any antitrust injury from Bylaw 2.06's disincentive effects. Because Sears is already excluded from membership in Visa, there can be no realistic disincentive for Sears to create additional proprietary cards.[36] This does not mean, however, that the admission of the disincentive evidence was improper. The disincentive evidence, although irrelevant to the question of antitrust injury, is relevant to the jury's Rule of Reason inquiry regarding the anticompetitive effects of Bylaw 2.06.

Sears had standing to bring its Section 1 claim against Visa on the basis of its allegation that it was wrongfully excluded from Visa membership. When a plaintiff has established standing to challenge a restraint, it may present relevant evidence as to all anticompetitive effects of the restraint in the relevant market. It is not limited to those effects which directly affect the plaintiff.

The question of antitrust injury, of course, is a separate inquiry. If the fact-finder determines that a restraint of trade is unreasonable, it must then determine whether there is sufficient evidence to find

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[36] It is conceivable that Sears could argue that it was affected by the disincentive aspects of Bylaw 2.06 because Sears would choose membership in Visa over continuing to operate the Discover Card, but Sears offered no evidence to support such an argument.

that the plaintiff suffered antitrust injury as a result of the unreasonable restraint. This inquiry is properly limited to evidence relevant to the plaintiff's alleged injury.

Visa's argument confuses the issue of standing with admissibility of evidence. All evidence of anticompetitive effect is relevant to the Rule of Reason examination. The fact that such evidence is not relevant to the injury inquiry does not render it inadmissible, unless it is unfairly prejudicial or otherwise objectionable under Rule 403 of the Federal Rules of Evidence. In this case, no such objection was warranted. Accordingly, Sears' evidence of the disincentive aspects of Bylaw 2.06 was properly admitted as evidence of the bylaw's effect on competition in the relevant market.

Visa argues, however, that such a holding allows Sears to "mix and match" its claims–it allows Sears to prove an antitrust violation based solely on its disincentive evidence, while proving injury based on its exclusion from the Visa system. *Visa's Nov. 24, 1992, Mem.*, at 54-55. Such a result, however, was precluded by the court's instructions to the jury.[37] These instructions, together with the special

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[37] The jury was instructed on the issue of injury as follows:

If you determine that Visa has unreasonably restrained trade in the relevant market, you must next determine whether Sears was injured by Visa's actions. Proving injury does not require Sears to prove a dollar amount, but only that Sears was in fact injured by Visa's alleged restraint of trade. It is important to understand that injury and the amount of damages are different concepts. In this trial, you will not be determining the amount of damages, if any, suffered by Sears.

To establish injury, Sears must have offered evidence which establishes as a matter of fact and with a fair degree of certainty that Visa's alleged illegal conduct was a material cause of Sears' injury. This means that Sears must have proved that some injury flowed to it as a result of Visa's alleged restraint of trade. If the injury would be merely incidental or inconsequential, or if Visa's antitrust acts would be so removed from the injury as to be only remotely causative, then Sears would not be injured by reason of anything forbidden in the antitrust laws. Sears is not required to

verdict form, made it clear that the question of injury is a separate inquiry from the reasonableness determination. The jury was instructed that Sears carried the burden of proof as to each issue, and that each inquiry must be supported by the evidence. The jury was instructed that Sears' alleged injury must flow from the antitrust violation. This precluded a "mix and match" verdict.

The court has found that evidence of the exclusion of Prime Option Visa from the market was sufficient to support a finding of antitrust injury. It follows, therefore, that the jury's finding of antitrust injury rested on this argument. It also follows that the jury's finding of substantial harm to competition rested, at least in part, on this same argument. The court's instruction informed the jury that Sears' injury must be the result of the alleged antitrust violation. If the jury's finding of violation rested solely on Sears' disincentive evidence, it would not (and could not) have found that Sears suffered antitrust injury. Implicit in the jury's finding of antitrust injury is a finding that the exclusion of Sears from Visa contributed to the substantial harm to competition.[38]

> prove that Visa's alleged restraint of trade was the sole cause of its injury; nor need Sears eliminate all other possible causes of injury to establish causation. It is enough if Sears has proved that the alleged restraint of trade was a material cause of its injury. However, if you find that Sears' injury was caused by something other than the alleged restraint of trade, then you must find that Sears has failed to prove the fact of injury.

Jury Instruction 24. It is assumed that the jury followed this explicit instruction and based its answer to the question regarding antitrust injury on a finding that Sears suffered antitrust injury as a result of Visa's antitrust violation.

[38] Visa argues that a new trial may be required "since it is impossible to tell from the jury's verdict whether their respective determinations of illegality and fact of injury were predicated on one claim rather than the other . . . ." *Visa's Nov. 24, 1992, Mem.*, at 55 n.53.

This argument was reiterated by Visa in a letter dated January 27, 1993. There, Visa submitted to the court a recently decided United States Supreme Court case, *Spectrum Sports, Inc. v. McQuillan*, __U.S.__, 113 S. Ct. 884, 122 L.Ed. 247 (1993). Visa asserts that this ruling supports the

II. THE CLAYTON ACT COUNTERCLAIM

The court now turns its attention to Visa's Counterclaim. The Counterclaim was tried in equity to the court based on the same evidence presented at trial relevant to Sears' Sherman Act claim. In its Counterclaim, Visa seeks an injunction under Section 16 of the Clayton Act to prevent Sears from attaining Visa membership. This request for injunctive relief is based on Visa's assertion that Sears' entry into the Visa joint venture as a member-owner would violate Section 7 of the Clayton Act. Section 7 prohibits any person engaged in commerce from acquiring the stock or assets of another when "the

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proposition that "a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury." *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987). In *Spectrum Sports*, the jury found the defendant liable under Section 2 of the Sherman Act, but it was unclear whether the jury based its decision on a finding of monopolization, conspiracy to monopolize or attempted monopolization. Because there was insufficient factual evidence to support a finding of attempted monopolization and it was possible that the jury rested its decision regarding liability on that theory alone, the Supreme Court held that the case had to be retried. In the instant case Visa argues that because the jury verdict with respect to injury does not indicate what evidence was the basis of the jury's decision, the verdict must be set aside.

Visa's argument and the holding of *Spectrum Sports*, however, have nothing to do with the present case. Here, it is not impossible to tell upon what evidence the jury relied in making its determination of injury. As discussed above, Sears' exclusion evidence was the basis for the jury's finding of antitrust injury. Likewise, this evidence was necessarily relied upon, at least in part, in finding the restraint to be unreasonable. *Spectrum Sports* stands for the simple proposition that if one theory upon which a verdict of liability may have been based was improperly submitted to the fact-finder the case must be retried. That is obvious because the verdict may rest on an impermissible legal standard. But such a concept has no application whatsoever in this case in which all evidence of liability (both disincentive evidence and Sears' exclusion evidence) was properly admitted, and in which the jury was properly instructed that Sears' injury must flow directly from the anticompetitive restraint. In *Spectrum Sports* an improper theory was submitted to the jury. No such submission occurred here.

effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C.A. § 18 (Supp. 1992).[39] "The entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions," are "within the scope of § 7." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 342, 83 S.Ct. 1715, 1730, 10 L.Ed.2d 915 (1963).

The purpose of Section 7 is "to arrest incipient threats to competition which the Sherman Act did not ordinarily reach." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 171, 84 S.Ct. 1710, 1717, 12 L.Ed.2d 775 (1964). Section 7 is violated when "a 'tendency' toward monopoly or the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown." *Id.* In determining whether there has been a violation of Section 7 of the Clayton Act, it must be shown that the effect of the acquisition at issue "may be substantially to lessen competition [ ] in any line of commerce in any section of the country." *Philadelphia National Bank*, 374 U.S. at 355, 83 S.Ct. at 1737.[40]

Visa claims that competition in the relevant market would be adversely affected if Sears were to attain Visa membership, and consequently seeks an injunction. Sears, on the other hand, claims

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[39] The statute provides, in pertinent part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 15 U.S.C.A. § 18 (Supp. 1992).

[40] "Line of commerce" refers to the relevant product or services market. *Philadelphia National Bank*, 374 U.S. at 356, 83 S.Ct. at 1737. The term "section of the country" applies to the relevant geographical market for the product. *Id.* In the instant case, the parties have agreed that the relevant market is the general purpose charge card market for the United States.

that its entry into the Visa system will stimulate competition in the general purpose charge card market.

A. Standing

A private party such as Visa must have standing to seek an injunction under Section 16 of the Clayton Act. Section 16 provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C.A. § 26 (Supp. 1992). However, under Section 16, the threatened injury must be "'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)); *see also Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183 (10th Cir. 1983). In short, to have standing, Visa must have a sufficient stake in a justiciable controversy to seek judicial resolution. *See Sierra Club v. Morton*, 405 U.S. 727, 731-32, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972).

Because the antitrust laws were designed to protect competition, not competitors, a mere threat of lost profits, for example, does not normally by itself constitute an appropriate antitrust injury under Section 16. *Brunswick*, 429 U.S. at 488, 97 S.Ct. at 697 (*citing Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)). Rather, an antitrust "injury should reflect the anticompetitive acts made possible by the violation." *Id.*, 429 U.S. at 489, 97 S.Ct. at 697. In the instant case, unless Visa's alleged injuries are tied to the possibility of decreased competition prohibited by Section 7 of the Clayton Act, Visa has not suffered an antitrust injury and would have no standing to seek injunctive relief.

Visa asserts that if Sears is allowed to join the Visa system, Discover will have access to confidential information concerning Visa marketing plans and other strategies. With such information, Visa argues, Sears could develop business plans to Discover's advantage. As such, Discover would have an unfair marketing advantage over Visa issuers which could result in a lessening of intrasystem and intersystem competition. Ultimately, some Visa

members would be unable to effectively compete. As a result, Visa's potential injury in such case would be directly related to the decrease in competition in the market.

In another argument to support standing, Visa asserts that Sears will obtain an unfair competitive advantage over other Visa member banks if Sears is allowed to issue Prime Option Visa. This unfair advantage will occur, Visa asserts, because Sears will be able to offer potential cardholders and merchants both Visa and Discover cards which other Visa members cannot do. The court finds that it is possible that this unfair competitive advantage could be accompanied by a reduction in competition between the two systems, which could possibly result in harm to Visa members.

Based on these claims of potential injury and decreased competition, the court finds that Visa has standing to bring its Counterclaim under Section 7 of the Clayton Act.

B. Application of the Merger Doctrine

After standing has been determined, the court must analyze the probable effects on competition in the general purpose charge card market if Sears, the sole issuer of the Discover Card, is allowed to enter the Visa joint venture as one of 6000 member-owners. Visa argues that Sears' attempt to join the Visa system is a "partial merger" of the two companies, and urges the court to analyze the impact on competition by applying antitrust law relevant to mergers. Such a "merger doctrine" analysis has been applied to joint ventures because "the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy." *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170, 84 S.Ct. 1710, 1716, 12 L.Ed.2d 775 (1964).[41]

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[41] *Penn-Olin* involved the joint participation of two corporations in the creation of a third. In comparing such a joint venture to a merger, the Court stated:

> The joint venture, like the "merger" and the "conglomeration," often creates anticompetitive dangers. It is the chosen competitive instrument of two or more corporations previously acting independently and usually competitively with

The instant case does not fit neatly into a merger analysis. Here, if Sears were to join the Visa joint venture, neither corporation would gain complete control of the other. However, there is no doubt that Section 7 applies to this "hybrid" case because, although considered an "anti-merger" statute, the very language of Section 7 makes clear that a "company need not acquire control of another company in order to violate the Clayton Act." *Denver & R.G.W.R.R. Co. v. United States*, 387 U.S. 485, 501, 87 S.Ct. 1754, 1764, 18 L.Ed.2d 905 (1967). The court, therefore, agrees that merger law, although not controlling, is at least a starting point for the analysis required under Section 7.

Under merger analysis, Sears' joining Visa as a member-owner would be characterized as a "horizontal" arrangement[42] because Discover and Prime Option Visa perform "similar functions in the production or sale of comparable goods or services." *Brown Shoe Co. v. United States*, 370 U.S. 294, 334, 82 S.Ct. 1502, 1529, 8 L.Ed.2d 510 (1962). In general, when an acquisition effects a horizontal merger between companies occupying the same relevant market, competition that previously existed between the two is eliminated. *Id.* at 335, 82 S.Ct. at 1529. When such a merger creates one "firm

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> one another. The result is "a triumvirate of associated corporations." If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce. Inevitably, the operations of the joint venture will be frozen to those lines of commerce which will not bring it into competition with the parents, and the latter, by the same token will be foreclosed from the joint venture's market.

Penn-Olin, 378 U.S. at 169, 84 S.Ct. at 1716 (footnote omitted).

[42] The court rejects Sears' assertion that the Clayton Act counterclaim requires an analysis based on a "vertical" merger. If the "merger" here were vertical, Sears would not have been allowed to bring an action under Section 1 of the Sherman Act. Furthermore, what must be examined is the effect on competition if the same parent organization, Sears, were to issue Prime Option Visa and Discover, two competing charge cards. If the "merger" were to occur, Prime Option Visa and Discover would be offering comparable goods, i.e., general purpose charge cards.

controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market," the United States Supreme Court has recognized a prima facie violation of Section 7. *United States v. General Dynamics Corp.*, 415 U.S. 486, 497, 94 S.Ct. 1186, 1193, 39 L.Ed. 2d 530 (1974) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963)); *see also Brown Shoe*, 370 U.S. at 343, 82 S.Ct. at 1533 (stating market share resulting from merger is one of the most important factors when determining probable effects on competition). The presumption has been created because significant market concentration makes it "easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level." *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) (quoting *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1282-83 (7th Cir.), *cert. denied*, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990)).

Evidence of such undue concentration in a market is usually presented in the form of market share statistics designed to signal the potential likelihood of collusion between firms. The most prominent of these statistical methods of measuring market concentration is the Herfindahl-Hirschman Index ("HHI"). *University Health*, 938 F.2d at 1211 n.12. The HHI is calculated by squaring the market share of each company in the relevant market, and then adding the squares. *Id.* "This formula reflects the distribution of market shares between firms and gives proportionately greater weight to the market shares of the larger firms, which likely accords with their relative importance in any anti-competitive interaction." *United States v. Rockford Memorial Corp.*, 717 F.Supp. 1251, 1279 (N.D. Ill. 1989), *aff'd*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920, 111 S.Ct. 295, 112 L.Ed.2d 249 (1990)). *Rockford Memorial*, 717 F. Supp. at 1279. When a market consists of many firms of approximately equal size, the HHI approaches zero. *Id.* Once a pure monopoly has been created, however, the HHI reaches its maximum of ten thousand. *Id.*

The United States Department of Justice uses the HHI in assessing possible violations of Section 7. Department guidelines characterize a market as highly concentrated if the HHI exceeds 1800. *University Health*, 938 F.2d at 1211 n.12 (citing U.S. Dep't of

Justice, Merger Guidelines §§ 3.1, 3.11(c), 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,560-61 (1988)). In such a concentrated market, any increase of the HHI by 50 or more raises serious antitrust concerns. *Id.* Furthermore, any merger that increases the HHI by more than 100 and results in a post-merger level of 1000 or more signals a red flag. *Id.* In both situations, courts have recognized a prima facie violation of Section 7.

During trial, to rebut Sears' Sherman Act claim, Visa argued that the market for all charge card issuers is highly unconcentrated. This low concentration is obtained when each of the 6000 Visa and MasterCard issuers is viewed as a single company and the market share of each issuer is squared and added together. But in its Clayton Act counterclaim, Visa urges the court to analyze the market on a "system-wide" basis, viewing the Visa and MasterCard joint ventures as single companies. Under such a view, market share would be determined by adding together the individual shares of each system. Such a "system-wide" analysis, which Visa advocates under the Clayton Act, would result in a highly concentrated market.

Based on testimony by Sears' expert, Professor Kearl, Visa asserts that the relevant market shares are as follows: Visa 45.6%; MasterCard 26.4%; Discover 5.5%; American Express 20.5%; and Diners Club 2.0%. Using these figures, Visa claims that the HHI for the general purpose charge card market is 3231,[43] well above the Justice Department's "highly concentrated" merger threshold of 1800. Visa argues that Sears' acquisition of a Visa membership through Prime Option would increase the HHI to 3732, [44] an increase of more than 100 under the merger guidelines.[45] As a result, Visa

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[43] This figure of 3231 is obtained by squaring the market shares of each system issuer and then adding the total: $45.6^2 + 26.4^2 + 5.5^2 + 20.5^2 + 2.0^2 = 3231$.

[44] This figure of 3732 is obtained by adding Discover's market share of 5.5% with Visa's share of 45.6% for a total of 51.1%. That figure is then squared and added to the squares for the other systems: $51.1^2 + 26.4^2 + 20.5^2 + 2.0^2 = 3732$.

[45] Visa points out that under Dr. Kearl's view, of the general purpose charge card market, the market shares of Visa and MasterCard

claims that it has presented a prima facie case that Sears' proposed membership in Visa would substantially lessen competition in the future.

The court does not agree that the "merger" at issue would result in a significant increase in the concentration of companies in the relevant market under an HHI analysis. First, the court does not find it appropriate to view the general purpose charge card market on a system-wide basis for the purpose of an HHI analysis. Persuasive evidence was presented which showed that intrasystem competition within Visa and MasterCard is vigorous. For example, evidence showed that the Visa and MasterCard systems are not proprietary, but rather are owned by approximately 6000 members. Furthermore, members are free to set their own prices and output, and both systems generally remain open to new members, including significant competitors such as AT&T, GTE and General Motors Corporation. Based on this evidence, the court agrees with Visa's expert Professor Schmalensee that *each* individual issuer of Visa and MasterCard cards should be included in the HHI analysis, resulting in a system HHI of below 500.[46]

Next, even if the court were to accept Visa's argument that market share in the general purpose charge card market should be measured on a system-wide basis, the court still does not find merit in Visa's HHI argument. Visa's analysis depends on a true merger between the parties in which Discover's market share would be subsumed within that of the entire Visa system. Such a characterization of the market system, however, is inaccurate and

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should be combined, yielding a total market share of 72%. Using this figure, Visa asserts that the market would then have a pre-"merger" HHI of 5639, and a post-"merger" total of 6431. This change in the HHI would make out a prima facie case of a Section 7 violation.

[46] In making this assertion, the court does not claim that the Visa association lacks market power. Rather, the court believes that the HHI analysis deals strictly with the concept of market shares, and is most helpful in assessing the possible impact on competition when companies combine their market shares through merger or the creation of joint ventures. The court finds, however, that the HHI is not particularly helpful in assessing the impact on competition under the facts of this case.

misleading. The court has found that Discover Card will remain a viable competitor in the relevant market. Visa will have no control over Discover Card, and Sears will not control the Visa system.[47] Consequently, Sears' entry into the Visa system through Prime Option cannot be deemed a merger of Discover Card and Visa. For purposes of the HHI analysis, therefore, the relative market shares of Visa and Discover would not be affected and the HHI would remain unchanged.

Based on the court's assessment of Visa's HHI argument, the court finds that Visa has not met its burden of showing anticompetitive effects based on the HHI analysis of concentration of companies in the market. *University Health*, 938 F.2d at 1218; *see Philadelphia National Bank*, 374 U.S. at 363, 83 S.Ct. at 1741. Therefore, the court concludes that Visa has not made out a prima facie case under Section 7.

C. Determination of Anticompetitive Effects

Because there has been no prima facie showing of anticompetitive effects by Visa, the court must examine the probable effects of the merger to determine whether there exists a possible substantial lessening of competition or a tendency to create a monopoly in the general purpose charge card market. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 317, 82 S.Ct. 1502, 1519, 8 L.Ed.2d 510 (1962). Probabilities are the focus of the inquiry because "section 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963) (citing

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[47] The court recognizes that Visa and Discover will not remain entirely independent. Sears, the owner of Discover, will presumably control a share of the Visa system through Prime Option. However, Sears would be only one of approximately 6000 Visa issuers. Even if Sears were to meet its stated goal of becoming one of the five largest Visa issuers, (*see* Tr. at 187; Def.'s Ex. 72, at S112131), its market share of the Visa system would be less than 10%. This would not constitute a complete merger of the two entities. At best, it could be called a partial or hybrid merger. Under such circumstances, the court finds that the HHI analysis is not particularly useful in determining the probability of anticompetitive effects.

Brown Shoe Co. v. United States, 370 U.S. 294, 317, 322, 82 S.Ct. 1502, 1519, 1522, 8 L.Ed.2d 510 (1962)).

In analyzing the possible harms and benefits, the court should have "a firm understanding of the structure of the relevant market." *Philadelphia National Bank*, 374 U.S. at 362, 83 S.Ct. at 1741; *see Brown Shoe*, 370 U.S. at 321-22, 82 S.Ct. at 1521-22. Without such understanding, it would be difficult for the court to accurately determine what effects Sears' membership in Visa would have on the general purpose charge card market.

1. Analysis of the Market Structure

The history of the development of the general purpose charge card market, discussed in the Background section of this Opinion, has led the court to several conclusions regarding the present structure of the market. First, the court finds that the existence of joint ventures, such as Visa and MasterCard, has had a positive effect on competition and consumers. Only large firms with significant capital have the ability to enter the national charge card market as sole proprietors. The national charge card associations, as a result of their open membership policies, allow smaller institutions which would not normally be able to compete to enter the market. With no restrictions on price or output, these joint ventures have further benefitted competition and consumers because many smaller institutions, in order to effectively compete with the larger firms, offer highly competitive interest rates and other features. These conditions have led to healthy intrasystem competition among the members of Visa and MasterCard.

The evidence presented at trial also leads the court to conclude that different brands of general purpose charge cards appeal to different consumer interests. American Express, Diners Club and Carte Blanche appeal to the "transactional" consumer who wants, and has the ability, to pay off the entire balance each month. Visa and MasterCard, on the other hand, appeal to the customer who wants the option of revolving credit. Discover, with its no annual fee and cash-back features, appeals more to the transactor than the revolver, although clearly there are numerous Discover customers who revolve each month. These choices among the various charge cards promote competition by giving consumers alternatives when choosing which

card they prefer to carry, or if they carry more than one card, which one they prefer to use in a particular circumstance.

Finally, the court finds that intersystem competition has helped promote innovation in the development of transactional processing systems and merchant base expansion, thereby benefitting consumers. Therefore, the court concludes that intersystem competition is important in promoting consumer welfare in the general purpose charge card market.

2. Effects on Competition

Relying on the conclusions made above, the court now turns its attention to the possible effects on the market if Sears were to join Visa as a member-owner. Visa claims that Sears' entry into the joint venture may substantially lessen competition claiming that harm to competition may occur in two ways: 1) Discover will abandon its merchant discount competition and will cease its direct advertising competition against Visa; and 2) Sears will use its presence on the Visa board to obtain confidential information regarding Visa activities.

In response, Sears has argued that its entry into the Visa system as a member-owner has several benefits for competition. First, Sears claims that intrasystem competition among Visa members will increase due to the presence of the low-cost Prime Option card. In addition, Sears claims that its entry into the Visa system will encourage other companies who wish to issue both a proprietary card and a bankcard (i.e. Visa and MasterCard), to do so. Sears argues that Bylaw 2.06 at present is a disincentive to such companies because the bylaw forces companies to chose one type of card over another, thereby lessening intersystem competition in the general purpose charge card market.

As the fact-finder in the Clayton Act counterclaim, the court has analyzed the possible impacts on competition if Sears were to issue Prime Option Visa. In determining whether Sears' entry into the Visa system may substantially lessen competition, the court has weighed the possible harms of that entry against the possible benefits. First, the court agrees that intersystem competition will be decreased by Sears' entry into the Visa system as the owner of Prime Option

Visa. Sears' ownership of Prime Option Visa will likely cause Sears to change its marketing strategy, thereby decreasing competition between Visa and Discover to a certain degree. However, the court finds that competition between Discover and Visa will be far from eliminated, and Sears will continue to vigorously market the Discover Card.

Discover and Visa appeal to different consumer needs within the general purpose charge card market.[48] By launching Prime Option Visa, Sears does not intend that its customers abandon the Discover Card. Evidence was presented at trial that Sears intends that the Discover Card will "continue to grow in the business and . . . remain profitable." (Tr. at 986). Although such testimony may have been self-serving at the time, the court does not believe that Sears intends to abandon the Discover Card after its tremendous capital investment in the program and Discover's apparent unparalleled success. Rather, the evidence indicated that Sears intends Prime Option Visa to target the customer who prefers those features offered by bankcard issuers. The court concludes that the Discover customer to be targeted by Prime Option Visa is the customer who already carries, and uses, a bankcard of some type. Furthermore, the court believes that Sears' entry into the Visa system will not prompt the remaining 6000 Visa members to stop advertisements and promotions aimed at the Discover Card market. If Discover remains a healthy competitor, which the court believes it will, Visa will continue to have the incentive to vigorously compete.[49]

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[48] The court notes that competition between Visa and MasterCard decreased following duality. The court believes that one significant reason for this change was due to the fact that Visa and MasterCard are nearly identical products, appealing to the same consumer needs.

[49] Although the court must assess probabilities which might result from Sears' entry into the Visa system, it is difficult to properly assess whether American Express will follow Sears' lead and seek Visa membership. American Express issues the Optima "revolver" card and the "transactional" green card, but the court does not have facts before it concerning the type of consumer targeted by the Optima card. As a result, the court declines to conclude that American Express would also enter the Visa system, causing a lessening of competitive vigor of the Optima card.

The second possible impact on competition the court must assess is based on Sears' acquisition of confidential information regarding Visa's activities. The court agrees with Visa that Sears' presence on the Visa Board raises a concern regarding confidential information, and will likely cause a decrease in intersystem competition. *See F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 818 (2d Cir. 1979). However, the court finds that Visa has alternative remedies to this problem short of denying Sears membership in the Visa joint venture. It is certainly within Visa's power to provide for sanctions, including loss of membership, for any Visa member who shares confidential information with a competitor. As a result, the court finds the potential negative impact on competition is negligible.

Next, the court must assess the possible impact that Prime Option Visa may have on intrasystem competition. Sears claims that Prime Option Visa will stimulate intrasystem competition among Visa issuers. The court agrees that intrasystem competition may be increased in the short run by the entry of a lower-cost card such as Prime Option into the Visa system. This conclusion is supported by evidence at trial, including testimony by Visa's own expert as well as evidence that indicates an increase in competition following AT&T, GTE, and GM's entries into the Visa and MasterCard systems. The court, however, is not convinced that this increase in intrasystem competition will continue over the long run. In fact, in the court's opinion, it is merely a matter of time before Prime Option Visa becomes one of the largest members in the Visa system. As such, like the other large issuers, Prime Option will have an incentive to maintain higher-than-average interest rates. In the long-run, intrasystem competition may not be enhanced to any appreciable degree.

Finally, the court must examine Sears' argument that its entry into the Visa system will encourage other firms to issue both proprietary cards and bankcards, thereby increasing both intersystem and intrasystem competition. Sears makes this argument by asserting that Bylaw 2.06 is a disincentive to firms interested in issuing both a bankcard and a proprietary card. The court agrees that competition will be enhanced, but only to a small degree.

The court reaches this conclusion because very few firms are in a position to issue both a bankcard and a proprietary card due to the large amount of capital required to begin a proprietary card. However, because of the small number of systems in the general purpose charge card market, if just one firm is discouraged from issuing a proprietary card because of Bylaw 2.06, it would have a negative impact on competition in this market. The court is persuaded that such a possibility does exist after reviewing Visa's own exhibit listing twenty-one Visa members considered to have the capability of issuing their own proprietary cards.[50] However, the court finds the possible benefit derived from this "incentive" to be minor because even those firms with the capability are unlikely to undertake the high risk and large capital investment required to launch a proprietary card.

D. Conclusions Regarding Clayton Act Counterclaim

In analyzing the "acquisition" at issue in this case, the court concludes that there has been no showing that Sears' entry into the Visa system as a member-owner may substantially lessen competition in the general purpose charge card market. First, Visa has not made a prima facie showing of a Section 7 violation because Sears' joining Visa does not constitute a true merger. Furthermore, in analyzing the possible effects of Sears' entry into the Visa system, the court agrees that the probable harms to competition will outweigh the probable benefits, but not so substantially as to rise to the level of a Section 7 violation.

In quantifying the possible harms and benefits to competition, the court agrees that intersystem competition will likely be harmed because Discover will not compete as vigorously with Visa after it issues Prime Option, and Sears will have access to confidential Visa information. However, these probable harms will not be significant. Sears intends the Discover Card to remain strong in the general purpose charge card market, and Visa has means by which it can control the dissemination of confidential information.

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[50] See Pl.'s Ex. 297, at 70201150. The parent organizations of these 21 Visa members include such prominent companies as the Ford Motor Company, Merrill Lynch, Kemper Insurance, ITT, J.C. Penney, and Aetna Life & Casualty Co. *Id.*

These probable harms to competition are weighed against the probable benefits of Sears' entry into the Visa system. The court has found that these benefits are slight, but they offset the harms to some degree. Consequently, in weighing the possible effects, the court concludes that Visa has failed to show that competition in the general purpose charge card market may substantially lessen if Sears joins the Visa system.[51] Based on the foregoing, the court holds that Sears' entry into the Visa joint venture as a member-owner will not violate Section 7 of the Clayton Act. For that reason, Visa's Counterclaim is DISMISSED.[52]

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[51] The court's factual attitudes toward Sears' Sherman Act claim and Visa's Clayton Act counterclaim are identical. In both situations, the court sees the entry of Sears into Visa as slightly more harmful than helpful to competition, although not substantially more harmful. If before this litigation was ever commenced, the trial judge had been given the authority to tell Visa what it could or could not do under the antitrust laws, and Visa had then inquired whether it could keep Sears out of Visa, the answer would have been "yes." Conversely, if Visa had asked whether it could let Sears in the association, the answer would have also been "yes." Unfortunately for Visa, only the latter question was directed to the court while the former went to the jury, which said "no."

[52] Sears argues that the court is precluded from rendering a verdict in favor of Visa on the Clayton Act counterclaim unless the court also grants Visa's motion for judgment as a matter of law. Sears bases this assertion on the doctrine of collateral estoppel or issue preclusion.

It appears to the court that the better reasoning is that despite the jury's verdict, the court is not precluded from deciding the Clayton Act claim. *See Milonas v. Williams*, 691 F.2d 931, 935 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069, 103 S.Ct. 1524, 75 L.Ed.2d 947 (1983) (trial judge entered permanent injunction against defendants despite jury's prior verdict in favor of defendants on damages issue). The court is not persuaded that collateral estoppel is applicable because of the different standards applied to the two causes of action at issue. Determination of the collateral estoppel issue, however, is not necessary here as the court does not find sufficient evidence to sustain a Clayton Act violation.

III. VISA'S MOTION FOR NEW TRIAL

Visa seeks a new trial pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure. Rule 59 allows the court to grant a new trial "upon any grounds which, in the sound judgment of the trial court, [are] in the interest of the proper administration of justice." *Tidewater Oil Co. v. Waller*, 302 F.2d 638, 642-43 (10th Cir. 1962). For such purposes, the court need not view the evidence in the light most favorable to the non-moving party, but is allowed to weigh the evidence and the credibility of witnesses. *Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1266-67 (8th Cir.), *cert. denied*, 484 U.S. 855, 108 S.Ct. 161, 98 L.Ed.2d 116 (1987); *see Holmes v. Wack*, 464 F.2d 86, 88-89 (10th Cir. 1972).

A. The Weight of the Evidence

Visa first argues that the jury's verdict in Sears' favor is against the weight of the evidence, and therefore, it is entitled to a new trial. As discussed previously, although the court may not agree with the jury's verdict, it cannot and does not hold that the verdict is so overwhelmingly against the weight of the evidence that a new trial should be granted.

B. Essential Fairness of the Trial

Visa next argues that it is entitled to a new trial because the trial was fundamentally unfair and materially prejudicial to its position. Specifically, Visa argues that it was denied a fair trial because (1) Sears' trial tactics placed excessive emphasis on issues that were only marginally relevant to a Section 1 claim; (2) the court refused to give limiting instructions requested by Visa, compounding the injustice inflicted on Visa by Sears' trial strategy; and (3) Sears did not present a proper antitrust lawsuit.

1. Sears' Trial Tactics

Visa complains that Sears engaged in trial tactics which undermined its right to a fair trial. Specifically, Visa argues that (1) Sears improperly raised an accusation of discrimination against Visa; (2) Sears' emphasis on Visa's "anti-Discover" campaign was prejudicial to Visa; (3) Sears' assertion of a "multi-card strategy" undermined Visa's right to a fair trial; and (4) Visa was prejudiced

when Sears invited the jury, by its verdict, to give consumers the "right to choose" whether Prime Option Visa should enter the market.

First, Visa complains that Sears improperly accused it of "discrimination." Sears presented evidence to show that one Visa member, Citibank, is allowed to issue both Diners Club and Carte Blanche as proprietary cards, while retaining its membership in Visa. This evidence, Visa argues, was improperly used to suggest that Visa acted unfairly and discriminatorily toward Sears, thereby prejudicing Visa in the eyes of the jury. Visa submits that the argument encouraged the jury to base its verdict on passion, prejudice, and notions of "fairness," rather than the governing antitrust laws.

Similarly, Visa argues that it was harmed by evidence of the "anti-Discover campaign." At trial, Sears presented evidence designed to show that shortly after the issuance of Discover, Visa took steps to hamper its success. Visa argues that Sears used this evidence to unfairly prejudice the jury, and to encourage an improper verdict.

The court finds, however, that neither of these trial tactics prejudiced Visa so as to require a new trial. With respect to these issues, the court gave a limiting instruction to the jury. The court instructed "that there is no contention or allegation in this case that any of these activities was unlawful. . . . This evidence was admitted so that you might understand the workings of the marketplace and the intent of the parties, in order to help you decide what effect the passage and enforcement of the amendment to Bylaw 2.06 has on competition in the relevant market." Jury Instruction No. 20.[53]

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[53] The entire text of Instruction 20 reads as follows:

During the trial you have heard evidence about certain business activities and decisions by both Sears and Visa. For example, you have heard evidence that Sears has refused to accept Visa cards in its department stores and that Visa has refused to let Sears issue a Visa card while permitting one of its members to issue Diners Club and Carte Blanche cards. You have also heard evidence about certain activities Visa undertook or encouraged its members to undertake after the Discover card was launched in early 1986 for the purpose of impeding Discover's success.

Visa's counsel proposed this language and did not object to the instruction. Given the fact that the jury was instructed as to the proper use of this evidence, the court does not find that its inclusion undermined Visa's right to a fair trial.

Visa next asserts that its right to a fair trial was hindered by Sears' evidence of a "multi-card strategy." At trial, Sears presented evidence that it intended to pursue a multi-card strategy from the outset. The evidence stated that prior to development of the Discover Card, Sears had decided to first issue a national proprietary charge card and then issue a national bank card such as Visa or MasterCard. Sears officers testified that they would not have issued Discover as a proprietary card had they known that such a decision would subsequently disqualify Sears from membership in Visa. Visa failed to object to this evidence when it was mentioned during Sears' opening statement and when it was presented during trial. However, Visa moved for a mistrial the day after this evidence was presented to the jury. At that time the court found that Visa had waived its right

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With regard to these various activities and decisions by Sears and Visa, I instruct you that there is no contention or allegation in case that any of these activities was unlawful. It is permissible for firms to choose how and with whom they will do business as long as such activity does not violate the antitrust laws. The antitrust laws do not necessarily require businesses to deal with similar firms in a similar manner. This evidence was admitted so that you might understand the workings of the marketplace and the intent of the parties, in order to help you decide what effect the passage and enforcement of the amendment to Bylaw 2.06 has on competition in the relevant market. You should give this evidence such weight, if any, that you believe it deserves in considering the actual antitrust claim made by Sears in this case regarding the competitive effect of Visa Bylaw 2.06.

Additionally, you have heard evidence concerning the fairness of certain activities undertaken by both parties. You are to consider such evidence only as it relates to or helps you understand the effect of the amendment to bylaw 2.06 on competition in the relevant market.

to object by failing to make a timely objection. Visa now raises the objection again in support of its motion for a new trial.

Again, the court rejects Visa's arguments on this point. The court finds that Sears presented this evidence to show that Bylaw 2.06, had it been in place when Sears first contemplated issuing a proprietary card, would have acted as a disincentive to Sears. The evidence was relevant to show that others may have had a similar disincentive. This evidence was also relevant to help the jury have a better understanding of the marketplace. In any case, the jury was instructed to base its verdict on the relevant antitrust laws, and not to be swayed by perceptions of fairness. Accordingly, the court finds that the evidence of Sears' multi-card strategy was relevant to the antitrust claim and was not unfairly prejudicial.

Finally, Visa asserts that Sears raised improper arguments during closing argument. Specifically, Visa objects to Sears' arguing that the jury should give consumers the "right to choose" whether Prime Option Visa may enter the marketplace. Visa claims that this argument is not legally relevant and was calculated to mislead the jury.

The court rejects this contention as well. First, Visa failed to raise an objection during the closing argument. Because of this failure to object, the court had no opportunity to cure any error. Accordingly, Visa has waived its right to object now. 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2472 (1971) ("A party will not be allowed to speculate with the court by letting error go unremarked and then seek a new trial on the basis of error if the outcome of the case is unfavorable to him.") In addition, the jury was instructed to follow the court's instruction of law with respect to the Sherman Act, and not the argument of counsel. Furthermore, it does not appear to the court that the comments complained of were harmful, clearly improper, or beyond the bounds of permissible argument. Consumer choice is the essence of competition. So long as the argument was focused on competition, the court finds that it was proper.

2. Supplemental Jury Instructions

Visa argues that the court erred in not giving certain of its proposed jury instructions. Specifically, Visa complains that it was prejudiced by the court's refusal to give Visa's proposed instructions 101, 102, and 103. Proposed Instruction 101 addressed the anti-Discover campaign,[54] Instruction 102 addressed the issuance of Carte Blanche and Diners Club charge cards,[55] and Instruction 103 sought

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[54] The entire text of Visa's Proposed Instruction 101 reads as follows:

> During the trial you have heard evidence about certain activities that VISA undertook or encouraged its members to take after the Discover card was launched in early 1986 for the purpose of impeding or preventing Discover's success. You have further heard testimony concerning what effect, if any, those activities had on the success of Discover.
>
> That evidence was admitted so that you might understand the workings of the marketplace including, in particular, the relations between the parties to this case. However, I instruct you that there is no contention or allegation in this case that such activities by VISA or its members were wrongful or that they violated the antitrust laws. As I have previously instructed you, it is the purpose of the antitrust laws to encourage vigorous competition. Accordingly, you should give evidence concerning VISA's activities in response to the introduction of the Discover card such weight, if any, that you believe it deserves in considering the actual antitrust claims made by Sears in this case, about which I previously have instructed you. However, you may not base any finding in this case upon a determination that the anti-Discover campaign was itself unlawful or anti-competitive.

[55] Visa submitted two versions of its Proposed Instruction 102. Version A reads as follows:

> You have heard evidence in this case about the fact that VISA has permitted others to become members of VISA since By-Law 2.06 was enacted and that it permits its members to issue other general purpose cards, such as MasterCard, Diners Club and Carte Blanche.
>
> The only issue before you is whether VISA By-Law 2.06

has unreasonably restrained competition in the market for general purpose charge cards in the United States. As to that issue, I instruct you that evidence concerning the issuance of other cards or the admission of other new members does not tend to prove that By-Law 2.06 is anti-competitive. The antitrust laws do not require businesses to deal with like firms in a like manner. This evidence was admitted solely to provide you with a full factual understanding of market facts which might be pertinent to the relations of the parties.

Visa's proposed Version B reads:

You have heard evidence on this case about the fact that VISA has permitted other firms to become members of VISA since By-Law 2.06 was enacted and that it permits its members to issue other general purpose cards, such as MasterCard, Diners Club and Carte Blanche.

The parties have submitted conflicting evidence on the nature and extent of the competition from such other card programs or systems and it is for you to resolve such conflicts. However, I instruct you that the antitrust laws do not require VISA to deal on the same or equal basis with other parties, be they members or non-members. Unless the effect of VISA By-Law 2.06 is to unreasonably restrain competition in the relevant market, a business such as VISA is free to determine for itself the parties with whom it will do business or share its property and it does not violate the antitrust laws for it to do business or share property with certain firms while refusing to do so with others, even others that are similarly situated.

Evidence concerning VISA's treatment of other firms has been admitted for the sole purpose of permitting you to understand the facts relevant to the market for general purpose credit cards and to help you evaluate VISA's purpose in enacting By-Law 2.06 in accordance with my prior instructions to you regarding intent. As the sole judges of the facts, you should resolve any conflicts in the evidence on this subject as you deem appropriate and should give this evidence such weight, if any, as you believe it is entitled on the issues I have mentioned. However, I instruct you that no finding of anti-competitive effect may be based upon the fact that VISA did not treat Sears and its affiliates in the same manner as it treated other businesses,

to preclude the jury from considering evidence of Sears' multi-card strategy.[56] These instructions were designed to instruct the jury to disregard certain evidence which Visa considered to be irrelevant and/or prejudicial.

The court finds, however, that it was not necessary to give these instructions. The basic concerns articulated in Visa's proposed instructions were addressed by the court's Instruction 20. As discussed in Part I of this Opinion, the disputed evidence was relevant to the antitrust claim. It was not necessary to prohibit the jury from considering such evidence, especially in light of Instruction 20 which limited the jury's use of such evidence.

As to Visa's Proposed Instruction 103, which sought to preclude the jury from considering evidence of Sears' multi-card strategy, the court again rejects Visa's argument. This instruction was an attempt by Visa to exclude evidence to which it failed to timely object and which the court has found to be relevant to Sears' disincentive argument. The court's refusal to give the proposed instruction was not prejudicial.

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whether or not you consider the reasons for such treatment to be fair.

[56] The entire text of Visa's Proposed Instruction 103 reads as follows:

> Sears has introduced evidence that in 1983 it adopted a multi-card strategy, that it did so in reliance upon VISA's membership rules as they then existed and that if Sears had known that VISA would thereafter change its membership rules Sears might have made different business decisions with respect to how it chose to enter the general purpose charge card market. VISA has offered contrary evidence on these issues.
>
> This evidence was admitted solely for the purpose of permitting you to understand the history of the relationship between the parties. I now instruct you that no claim of anticompetitive effect may be based on this evidence. There is no claim in this case, nor can there be, that VISA has violated the anti-trust laws by interfering with Sears' alleged multi-card strategy.

3. The Propriety of Sears' Antitrust Case

Visa finally argues that Sears did not try a "proper" antitrust case. Visa seems to argue that because it lost at trial, and because it had such a far superior case, Sears must have presented an improper case. However, the court does not in any way find that Sears tried an improper case. Sears' case was clearly effective and was tried in such a way that the jury understood Sears' position. Visa failed to object to any impropriety of this nature during the trial. Visa had every opportunity to present all evidence it chose to present. If Visa felt that certain antitrust issues were not sufficiently illuminated, it could have presented evidence to that effect to the jury. The jury system was fully utilized and available to both sides under the rules of civil procedure and the rules of evidence.

Based on the foregoing, Visa's motion for a new trial is **DENIED**.

SUMMARY AND CONCLUSION

For all of the above reasons, the verdict of the jury will stand. Visa's legal argument is without precedent and is contrary to the law of the Sherman Act. What Visa has, and has had from the beginning, is a factual argument that it wants to turn into a legal argument. It is understandable for Visa member banks to feel that it is somehow unfair that they should be required to allow one of their most successful rivals into their association.

Based on its exclusion from the Visa association, Sears filed suit under Section 1 of the Sherman Act, which clearly prohibits "combinations" unreasonably in restraint of trade. If Visa were a single entity the suit would have been summarily dismissed, but Visa is not a single entity. It is a combination of 6000 financial institutions, all of whom are joined together in a worldwide credit system whose modest goal is to be "everywhere you want to be." As a combination, Visa is subject to a Section 1 suit. As an allegedly efficiency-enhancing joint venture, Visa escaped a finding of *per se* illegality, and was entitled to a full Rule of Reason inquiry. This case is as simple as that, Visa's protestations and legal theses to the contrary.

Visa would have this court remake the Sherman Act to exempt this particular joint behavior from full antitrust scrutiny. It urges an extension of the concept of essential facilities into a legal requirement in refusal to deal cases, a meritless argument that, if adopted, would practically eliminate as potential antitrust plaintiffs all but the bankrupt, the defunct, and the discredited. Visa urges, as a matter of law, recognition of special antitrust deference to this type of joint venture in this type of circumstance. The argument is novel, but it has no support whatsoever in the law.

Visa's argument does have support in the facts, and Visa presented to the jury a credible and well-organized factual case. Sears did the same. Visa received what it was entitled to: a trial. Sears availed itself of the jury system, as was its constitutional right. The jury was by all indications attentive and diligent. The jurors sat patiently through three and one-half weeks of trial. They deliberated for two full days. During their deliberations, they asked to look at a transcript of the trial, which was provided to them. Each juror was given a set of the court's instructions on the law, which they were allowed to keep during deliberations. They were on time. They took notes. The jurors willingly did everything they were asked to do. Their task as fact-finders was not an easy one, and they carried it out in an admirable and conscientious fashion. They reached a verdict fairly and unanimously. Each juror was polled after the verdict was read. There was no doubt about their decision. It was reasonably based on the plaintiff's view of the evidence. Even though the trial judge may well have decided the Sherman Act claim differently than the jury, it was not mere "puffing" when he told the jury in instruction number two that "you are the exclusive judges of the facts."

This result is a proper validation of our jury system. To hold otherwise would be an unauthorized use of the court's powers. To grant Visa's legal motion would be to remake the law and thereby invade the province of Congress; to grant Visa's motion for a new trial or judgment notwithstanding the verdict would be to improperly intrude into the jury's exclusive domain. The court will do neither.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

Docket No. 91-C-47B
Decided Aug. 11, 1992

SCFC ILC, INC., d/b/a MountainWest Financial,

Plaintiff,

v.

VISA U.S.A. INC.,

Defendant.

VISA U.S.A. INC. and Visa International Service Association, Delaware corporations,

Counterclaimants,

v.

SEARS, ROEBUCK AND CO., a New York corporation; Sears Consumer Financial Corporation, a Delaware corporation, and SCFC ILC, Inc. d/b/a MountainWest Financial,

Counterdefendants.

Randall A. Hack, Leonard A. Gail, James D. Sonda, James H. Gale, Chicago, Ill., Gary F. Bendinger, Carol Clawson, Salt Lake City, William H. Pratt, Chicago, Richard W. Giauque, Salt Lake City, Utah, for plaintiffs and counter-defendant.

Dale A. Kimball, Heidi E. Leithead, Clark Waddoups, Salt Lake City, M. Laurence Popofsky, Stephen V. Bomse, Renata M. Sos, San Francisco, Cal., Scott R. Ryther, Jonathan A. Dibble, Elaine A. Monson, Don B. Allen, Salt Lake City, Utah, for defendants.

Dale Kimball, Heidi E. Leithead, Clark Waddoups, Salt Lake City, Utah, Judith Z. Gold, Susan Rice, Stephen V. Bomse, San Francisco, Robert G. Merritt, Renata M. Sos, San Francisco, Cal., Scott R. Ryther, Salt Lake City, Utah, for counter-claimant.

MEMORANDUM DECISION AND ORDER

BENSON, District Judge.

This case came on regularly for hearing before the court on July 30, 1992 on various motions filed by both parties. The plaintiff[1] was represented by William H. Pratt and Gary F. Bendinger. The defendant was represented by M. Laurence Popofsky, Stephen V. Bomse, Dale A. Kimball, Clark Waddoups and Renata M. Sos.

The court heard argument on various motions including: 1) Visa's Motion for Summary Judgment on Sears' antitrust claim based on Section One of the Sherman Act; 2) Sears' Motion for Summary Judgment on Visa's antitrust counterclaim based on Section Seven of the Clayton Act; 3) Sears' Motion for Summary Judgment on Visa's non-antitrust counterclaims; 4) Sears' Motion to Bifurcate the trials of the antitrust and non-antitrust counterclaims; 5) Visa's Motion to Compel Discovery; 6) Sears' Motion to Compel the return of privileged documents; 7) Sears' Motion to Quash the subpoena sent to Sears' legal counsel, Kirkland & Ellis; and 8) Visa's Motion for Additional Discovery. At the hearing, the Court granted Visa's Motion for Additional Discovery, allowing Visa the opportunity to depose Mr. B.J. Martin regarding Sears' plan for Prime Option in light of Sears' recent Salt Lake City-based press conference on the subject. In this order, the court will not address further the Motion for Additional Discovery.

BACKGROUND

The background of this case is set forth in this court's previous order at 784 F.Supp. 822 (D. Utah 1992). Briefly, some of the pertinent facts are as follows. Visa is a joint venture corporation that has credit card agreements with approximately 19,000 financial

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[1] Throughout the plaintiff's briefs, it has referred to itself as MountainWest. For purposes of this order, when referring to the plaintiff generally, the court will use Sears.

institutions in the United States. Sears is the owner of the Discover card, a nationally distributed credit card which competes for business with Visa. In 1989, Sears applied for a Visa membership through Greenwood Trust, a Delaware bank owned by Sears. According to a memorandum written by the then Senior Vice President for Operations of Discover Card, B.J. Martin, at least one purpose of the application was to permit Discover to "learn everything that was going on with its competitor, Visa." Visa denied the Greenwood Trust application and at the same time passed Bylaw 2.06 which would prevent Sears, any Sears affiliate, or any other direct competitor of Visa from becoming a Visa member.

Bylaw 2.06 reads as follows:

> If permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards.

After Visa's adoption of Bylaw 2.06, the top-ranking official of Sears Financial personally visited several Visa directors to dispute Visa's decision to pass Bylaw 2.06, and to threaten legal action if Visa failed to change the bylaw. No legal action was taken at that time.

In May 1990, Sears tried again to gain entry into Visa by purchasing from the Resolution Trust Corporation the assets of MountainWest Savings and Loan, an insolvent Savings and Loan in Sandy, Utah, that had a relatively small Visa membership of approximately 6,000 cardholders. Sears was aware of Visa's desire not to allow Sears as a member. Sears' acquisition of MountainWest was not communicated directly to Visa. However, Visa eventually discovered MountainWest's affiliation with Sears when Datacard, a credit card printer, requested that Visa approve the design of a new MountainWest Visa card blank and the printing of 1.5 million MountainWest Visa cards. Visa was informed by Datacard that the entity placing the order was Discover Card Services. The entity placing the order, however, was not Discover but was in fact Sears

acting through MountainWest. Sears did not expect this information to be communicated to Visa and instructed Datacard to tell Visa that the identification of Discover as the card issuer on the previous order had been due to Datacard's mistake. Nonetheless, Visa discovered the true identity of the owner of MountainWest and refused to authorize the printing of the 1.5 million MountainWest Visa credit cards. This lawsuit ensued.

DISCUSSION

I. *Visa's Motion for Summary Judgment*

A. Visa's Argument

Visa argues that it is entitled to Summary Judgment because the antitrust laws of the United States do not require a private business such as Visa to share its property with competitors. Visa asserts that because of its affiliation with Sears, MountainWest should not be allowed to become a member of Visa. Sears, Visa maintains, is a viable competitor in the credit card business, and does not need to be a member of Visa in order to successfully compete in the credit card market. Visa contends that "[a] joint venture's refusal, without more, to share its property with a competitor creates no viable antitrust claim. So long as the venture, itself, exists for legitimate, efficiency-creating purposes it has no more of a duty to share the fruits of its effort and innovation than any other lawful private business." (Visa's Memorandum in Support of Summary Judgment at p. 7). Furthermore, Visa claims that Sears can present a viable antitrust claim only if (1) Sears proves that Visa possesses market power in the relevant market and Sears is foreclosed from competition with cardholders and merchants; or (2) a Visa membership is an essential facility for Sears to compete in the general purpose credit card market.

In addition, Visa argues that Sears cannot prove that its exclusion by Visa has harmed competition in any way. Visa asserts that its actions are neither the type of restraint nor the type of harm that the antitrust laws were designed to cover. Visa asks the court to find as a matter of law that its policy assertions are correct.

Visa maintains that a business built and made successful by its members cannot be forced to share with competitors what it has

created. In other words, Sears should not be allowed a "free ride" on Visa's joint venture.

B. Sears' Argument

Sears asserts that Visa is not entitled to Summary Judgment because there are genuine issues of material fact that require this case to go to trial. Sears maintains that Visa has little direct legal support for its assertions. Sears contends that an open membership joint-venture such as Visa does not have an unqualified right to refuse to grant membership status to a competitor. Such a refusal, says Sears, must be in accordance with the antitrust laws. In this case, Sears argues that Visa's refusal to grant admission to Sears as a Visa member constitutes an illegal use of market power with a result that is anticompetitive in violation of Section One of the Sherman Act.

C. The Relevant Law

This is a unique case in antitrust jurisprudence. There is no controlling authority directly on point. There are, however, a number of cases, while not identical to this case, which offer guidance for resolving Visa's Motion for Summary Judgment.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985), is instructive. Northwest Wholesale Stationers was a cooperative made up of approximately 100 office supply retailers in the Pacific Northwest. Pacific Stationery & Printing Co. was expelled from the cooperative without explanation. The issue before the Supreme Court was whether the expulsion of Pacific was an unreasonable restraint of trade in violation of Section One of the Sherman Act. Pacific challenged the action of Northwest in barring it from continued membership. In determining whether Northwest's actions were *per se* illegal, the court held that "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *Id.* at 296, 105 S.Ct. at 2620-21. The Court further held that "[a]bsent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis." *Id.* at 297, 105 S.Ct. at 2621. While *Northwest Wholesale* differs from the case at bar, its

treatment of a cooperative gives significant guidance to the court on how it should treat a joint venture.

Visa is not persuasive in its argument that a joint venture has absolutely no duty to allow into its venture a competitor and that the antitrust laws cannot force it to allow Sears into the Visa joint venture. The Supreme Court has stated unequivocally that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 2856, 86 L.Ed.2d 467 (1985). While *Aspen Skiing Co.* was a case brought under Section Two of the Sherman Act, the analysis in this instance between Section One and Section Two is similar. Visa's argument that it has an absolute right not to deal with Sears is inaccurate. That right is a qualified right which must comply with the antitrust laws.

Visa argues that a joint venture, whether its membership is open or closed, should be treated like a single entity with the ability to exclude any of its competitors. An open joint venture, such as Visa, is similar to the cooperative in *Northwest Wholesale*. As in *Northwest Wholesale*, the Court must apply a rule-of-reason analysis. *Id.*

"[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). Under the rule-of-reason analysis, the competitive effects of an agreement "can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692, 98 S.Ct. at 1365. The Supreme Court has held that it is inappropriate for this court, as Visa asks it to do, to determine on the present state of the factual record that Visa's policy position is correct. "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Id.; see also, Eastman Kodak Co. v. Image Technical Services, Inc.*, ___ U.S. ___, ___-___, 112 S.Ct. 2072, 2088-89, 119 L.Ed.2d 265 (1992)

("[W]hen we weigh the risks of determining procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished, the balance tips against summary judgment."). Visa's policy argument is well taken by the court, but this court can only follow the law as articulated by statute and cases. This court cannot make policy. Visa's argument is better suited in this instance as one made at trial.

D. Section One of the Sherman Act

Sears' complaint is brought under Section One of the Sherman Act. Section One prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. Section One has been interpreted as prohibiting only "unreasonable" restraints of trade. *Northwest Wholesale*, 472 U.S. at 289, 105 S.Ct. at 2616. In order to determine whether Visa violated Section One, the rule-of-reason must be used. To prove a violation of the antitrust laws using the rule-of-reason, Sears must submit sufficient evidence to prove that an agreement existed which unreasonably restrained trade in the relevant market. *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 959 (10th Cir.) *cert. denied, Blue Cross & Blue Shield Inc. v. Reazin*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990). Furthermore, the inquiry is whether "the challenged agreement is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers*, 435 U.S. at 691, 98 S.Ct. at 1365.

The court cannot find from the facts, submitted to date by the parties, using the rule-of-reason analysis, that the antitrust laws were or were not violated. The court must be fully informed of all the facts in order to make such a decision. There are numerous facts in dispute that require the court to hear the evidence at trial. Generally speaking, these facts pertain to the areas of (1) Visa's intent in passing and enforcing Bylaw 2.06; (2) the relevant geographic and product markets; (3) the effect on competition of Visa's decision not to grant Sears' application for membership; and (4) Visa's market power. Only after hearing all the evidence can the court determine whether facts remain in dispute which should be determined by a jury, as the finder-of-fact, or whether this case may be decided as a matter of law.

Visa, with considerable force of persuasion, asks the court to rule as a matter of law that because Sears appears to be a viable competitor in the credit card market Visa's actions in excluding Sears from membership cannot be in violation of Section One of the Sherman Act. This should be the result, Visa argues, despite Visa's intent in excluding Sears, irrespective of Visa's market power, and without regard to whether such an exclusion is anticompetitive or harmful to consumers. This the court cannot do. Visa seeks a policy interpretation of first impression in a case where virtually all of the traditional antitrust areas of inquiry are in dispute. There is no agreement as to Visa's relative market power; there are serious differences of opinion by the parties as to Visa's motives in passing Bylaw 2.06, and legal experts and economists retained by both sides disagree with one another over the effect on competition of Sears' exclusion.

As tempting as it may be for a trial judge to interpret the Sherman Act in the manner presented by Visa, or, for that matter, in the manner proposed by the movant in *Northwest Wholesale* (i.e. *Pacific Stationery* argued for a *per se* violation by the cooperative, much as Sears could have attempted to claim a *per se* illegal horizontal group boycott by Visa member banks in this case), the Court is not permitted such interpretive authority where there exist genuine disputes of fact that are traditionally recognized as material in rule-of-reason cases. The general language of Section One increases the temptation to make legal, as opposed to factual, conclusions, but it is the simplicity of the same language that compels this court to exercise restraint. Section One clearly prohibits "a combination, . . .in restraint of trade." In the case now before the court, we have a decision by the Visa board of directors to exclude Sears from Visa membership on any terms. That appears to constitute a combination among separate actors to restrain trade. Whether such a restraint is unreasonable and therefore in violation of the antitrust laws, or reasonable (i.e. procompetitive) and therefore not in violation of the antitrust laws, becomes the issue. *Reazin*, 899 F.2d at 960. In the absence of clear guidance from the United States Supreme Court or the Tenth Circuit Court of Appeals requiring the adoption of Visa's policy argument as the correct interpretation of what Congress intended when it passed the Sherman Act in 1890, this

Court is not in a position to grant Summary Judgment as a matter of law. The statute itself, and the interpretation of it, especially the Supreme Court's language in *Northwest Wholesale, Aspen Skiing Co.*, and most recently, *Eastman Kodak*, and the Tenth Circuit's analysis in *Reazin* lead the court to the opposite result. Sears is entitled on the present state of the record to a trial.

Visa's argument that Sears' Section One claim must fail unless it can be shown that Visa membership constitutes an "essential facility" for Sears' effective competition in the general credit card market is also not well taken. Notwithstanding Professor Areeda's considerable musings on the subject, (*see, e.g.*, Visa's Memorandum in Support of Summary Judgment at pp. 8, 9, 18, 20), there is no controlling precedent stating that absent an essential facilities case, a claim such as the one asserted by Sears in this case must necessarily fail. There is no attempt by Sears to describe this case as an essential facilities case. Sears simply asserts that given its view of Visa's market power in the relevant market (70% to 90% of the general credit card market in the United States), Visa must accept Sears as a Visa member or be in violation of Section One of the Sherman Act. The finding of an essential facility is not at issue in this case, and need not be.

Based on the foregoing, Sears' antitrust claim cannot at this point be decided on Summary Judgment. Therefore, Visa's Motion for Summary Judgment is denied.

II. *Sears' Motion for Summary Judgment on Visa's Antitrust Counterclaim*

Count II of Visa's Counterclaim against Sears is a cause of action based on Section Seven of the Clayton Act. 15 U.S.C. § 18 ("Section Seven"). Sears has moved for Summary Judgment on this claim, arguing that Visa's antitrust suit is prohibited by the Bank Merger Act. 12 U.S.C. § 1828.

Pursuant to the Bank Merger Act, proposed bank mergers must be investigated and approved by the Federal Deposit Insurance Corporation before the merger can take place. Such mergers, however, are granted special immunity from antitrust litigation. A merger which has been approved and consummated under the Bank

Merger Act "may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than [Section Two of the Sherman Act]." 12 U.S.C. § 1828(c)(7)(C).

The Bank Merger Act only grants protection from suits which challenge the merger "alone and of itself." *Id.* It does not prohibit suits which challenge more than the merger transaction. Suits which challenge conduct subsequent to the merger are allowed under the Act.

In the present case, Sears' acquisition of MountainWest was approved and consummated pursuant to the Bank Merger Act. Thus, Sears has brought this motion, arguing that the merger has immunity from antitrust litigation.

Visa argues that its Section Seven claim is not barred by the Act because it does not challenge the acquisition "alone and of itself." The counterclaim, it is argued, challenges more than Sears' initial acquisition of MountainWest—it also challenges Sears' post-acquisition conduct.

Sears responds by arguing that Visa's counterclaim cannot possibly challenge post-acquisition conduct, because no such cause of action is allowed under Section Seven. It asserts that Section Seven only allows suits which challenge the initial acquisition of stock.

Thus, the primary issue with respect to this motion is whether Section Seven is limited to suits challenging the initial acquisition of ownership, or whether it also allows for suits based on post-acquisition conduct. If Section Seven only allows suits which challenge the initial stock purchase, Visa's counterclaim is prohibited by the Bank Merger Act. If, however, Section Seven allows suits which challenge anticompetitive conduct after the initial merger, the counterclaim is proper and is not barred by the Act.

The relevant portion of Section Seven states:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the

> jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

Visa cites to *United States v. E.I. Du Pont de Nemours & Co.*, 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957), and other cases[2] as support for its position that Section Seven allows for separate causes of action based on conduct occurring after the initial acquisition of ownership.

Sears maintains that Section Seven suits may not be based upon post-acquisition conduct. It concedes that such conduct may be relevant as *evidence* in determining the anticompetitive effects of a merger. However, Sears asserts, every Section Seven suit is ultimately a challenge to the stock acquisition itself. Sears argues that such an analysis is not inconsistent with *Du Pont* and the other cases cited by Visa. In each case, "the legality of the acquisition itself, rather than the conduct offered to support the challenge to that acquisition, was ultimately at issue." (Sears' Reply Memorandum in Support of Summary Judgment on Visa's Antitrust Counterclaims at p. 3).

The court has carefully reviewed *Du Pont* and the other cases cited by Visa. The court finds that *Du Pont*, standing alone, is inconclusive as to whether Section Seven provides for separate causes of action based on post-acquisition conduct. However, this issue was resolved by the Supreme Court in *United States v. ITT*

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[2] Specifically, Visa relies on *Mississippi River Corp. v. F.T.C.*, 454 F.2d 1083, 1088 (8th Cir.1972); *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211, 1214 (9th Cir.1970), *cert. denied*, 401 U.S. 939, 91 S.Ct. 934, 28 L.Ed.2d 219 (1971); *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 491 F.Supp. 1199, 1224 (D.Haw. 1980), *aff'd*, 732 F.2d 1403 (9th Cir.1984); and, *Julius Nasso Concrete Corp. v. Dic Concrete Corp.*, 467 F.Supp. 1016, 1023 (S.D.N.Y.1979).

Continental Baking Co., 420 U.S. 223, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975).

In *Continental Baking*, the Supreme Court identifies the type of suits which may be brought under Section Seven. It defines the word "acquisition" broadly, so as to allow for suits based not only upon the purchase of stock, but upon the subsequent holding and use of that stock.

In *Continental Baking* the government brought suit against a baking company for failure to comply with a consent order issued by the Federal Tax Commission. The order prohibited the company from "acquiring" other bakeries for a certain period of time. A dispute arose as to whether the word "acquiring" connotes a single or continuing violation. The Court was called upon to interpret the word. The Court stated:

> We need not go beyond the Clayton Act itself to conclude that "acquisition" as used in § 7 of the Act means holding as well as obtaining assets . . . .[T]he framers of the Act did not regard the terms "acquire" and "acquisition" as unambiguously banning only the initial transaction of acquisition; rather, they read the ban against "acquisition" to include a ban against holding certain assets.

Id. at 240, 95 S.Ct. at 936. The Court then clarified its holding in *Du Pont*, using the case as support for its decision. It stated:

> Similarly, this Court's opinion in [*Du Pont*] rests upon the conclusion that "acquisition" can mean, and in the context of § 7 of the Clayton Act does mean, both the purchase of rights in another company and the retention of those rights.

Id. 420 U.S. at 241, 95 S.Ct. at 937. The Court continues:

> "[A]cquisition" under § 7 is not a discrete transaction but a *status* which continues until the transaction is undone.
>
> Thus, under the order . . ."acquiring" must mean both the act of first obtaining assets and the *retention* and *use* of those assets.

Id. at 242-43, 95 S.Ct. at 938 (emphasis added).

This language makes it clear that the word "acquisition" encompasses more than the initial stock purchase. A Section Seven suit may challenge the acquisition, holding, and/or use of stock. It is not limited to suits against acquisitions.

In the present case, Visa's counterclaim challenges more than Sears' initial acquisition. It also challenges Sears' continued ownership of MountainWest. It attacks the way Sears has used (and intends to use) MountainWest as a means of participating in the Visa credit card program. This "holding" and "use" of MountainWest, it is alleged, constitutes a violation of Section Seven.

The Bank Merger Act does not prohibit Visa's counterclaim. The counterclaim does not challenge the merger transaction alone and of itself, and is therefore not barred by the Act. Accordingly, Sears' Motion for Summary Judgment on Visa's Antitrust Counterclaim is denied.

III. *Sears' Motion for Summary Judgment on Visa's Non-Antitrust Counterclaims*

Summary Judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It is the movant's burden to demonstrate the absence of a genuine issue of a material fact and to show that it is entitled to judgment as a matter of law. Sears bears this burden as it has moved the court for Summary Judgment on Visa's non-antitrust counterclaims of fraud, trademark infringement and breach of contract.

Sears attempts to subject Visa to Summary Judgment on its fraud claim by asserting that Visa has failed to establish essential elements of the claim. In order to prevail on a claim for fraud, Visa must establish four separate elements: (1) that the relationship between the parties was such that Sears owed a duty of disclosure to Visa, or that MountainWest made a false affirmative statement; (2) that the misrepresentation was made with knowledge of its falsity; (3) that Visa reasonably relied on the misrepresentation; and (4) that

damages resulted from the misrepresentation. If even one element is not established, the claim for fraud cannot proceed.

Whether a duty to disclose existed between the parties is a disputed issue. A duty to disclose will be imposed where a fiduciary relationship exists between two parties *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). Visa suggests that a fiduciary relationship exists between joint venturers, *Lynch v. MacDonald*, 12 Utah 2d 427, 367 P.2d 464, 468 (1962), but the Visa enterprise has not been definitively categorized as a joint venture. In *National Bancard Corp. v. VISA USA*, 779 F.2d 592, 601-602 (11th Cir.) *cert. denied*, 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986), for example, the court stated that "Visa exhibits characteristics of a joint venture, even if it is not technically a joint venture." The association between Visa and MountainWest remains disputed and thus so does the question of whether a duty to disclose existed.

Regardless of the classification of the relationship, however, Visa has alleged that a false affirmative statement was made in a membership agreement in which MountainWest stated that it was in compliance with Visa's requirements for membership, including Bylaw 2.06. Visa cites a statement made by Mr. Phillip Ware, who handles all day-to-day operations for MountainWest. Visa claims that Mr. Ware indicated to Visa that the relationship between MountainWest and Sears was "remote". Based on the fact that MountainWest is a subsidiary of Sears, that statement could provide sufficient basis for the first element necessary for Visa's fraud claim.

> The rule has long been settled . . .that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure."

Lacher v. Superior Court, 230 Cal.App.3d 1038, 1046-47, 281 Cal.Rptr. 640, 643 (1991) (quoting *Rogers v. Warden*, 20 Cal.2d 286, 289, 125 P.2d 7, 9 (1942)).

Visa must also show that the alleged misrepresentation was made with knowledge of its falsity. There is enough evidence in the record to establish at least a genuine issue of material fact in regard to this element of the fraud claim. Sears attempts to justify MountainWest's statement on its membership application that it was in compliance with all of Visa's operating regulations by stating that it was MountainWest's "legal position" that Bylaw 2.06 was invalid and did not apply to Sears. However, the question on the application did not ask whether or not MountainWest believed Visa's bylaws and regulations were valid, it simply asked whether MountainWest complied with Visa's membership requirements. MountainWest knew the provisions of Bylaw 2.06 and knew that its affiliation with Sears was contrary to the bylaw. MountainWest's "legal position" defense does not definitively establish that the misrepresentation was made without knowledge of its falsity.

Additionally, when Visa was asked to approve the credit card design for 1.5 million Prime Option MountainWest Visa cards, Sears instructed Datacard, the credit card printer, to inform Visa that the identification of Discover Card Services as the orderer had been due to Datacard's mistake. These factors combine to effectively establish that there is a question whether MountainWest knew that it was misrepresenting information to Visa.

Visa must also establish that its reliance on MountainWest's statement was reasonable in order to prevail on its fraud claim. *Cheever v. Schramm*, 577 P.2d 951, 954 (Utah 1978). Sears argues that Visa should have known of the affiliation between Sears and MountainWest because it was published in a number of industry publications and was known by several prominent Utahns.

Sears argues that Visa had a duty to inquire into MountainWest's affiliation with Sears; however, Visa could hardly have inquired into the affiliation when Visa did not know what facts were being withheld. Visa relies on the party submitting the application to make full and candid disclosure. In *Elder v. Clawson*, 14 Utah 2d 379, 384 P.2d 802, 805 (1963), the court stated that a duty to disclose may arise in the narrow circumstances where one party to a contemplated business transaction has knowledge "which is not within the fair and reasonable reach of the other party and

which he could not discover by the exercise of reasonable diligence," particularly where "the other party relies on him to communicate to him the true state of facts to enable him to judge the expediency of the bargain." Conversely, however, Sears argues that Visa "may not lay its failure to protect its own interests at the defendant's feet in the form of an allegation of fraud." *Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369, 1374 (Utah 1980). The reasonableness of Visa's reliance remains a genuine issue of material fact.

The last element of a claim for fraud is damages. Visa must establish that it sustained damages by reason of the alleged misrepresentation or non-disclosure. *Dilworth v. Lauritzen*, 18 Utah 2d 386, 424 P.2d 136, 138 (1967). Visa has established sufficient evidence to allow this claim to proceed. Although the alleged damages are negligible, they are damages sustained as a result of the alleged fraud. Mr. Steven Vondale, who reviewed the Prime Option Order submitted by Datacard, would not have had to research the order at all if MountainWest had acted candidly with Visa. "While the amount of damage need not be determined with mathematical precision, it must be supported by the evidence in the record." *Vaughn v. Gen. Foods Corp.*, 797 F.2d 1403, 1416 (7th Cir.1986), *cert. denied*, 479 U.S. 1087, 107 S.Ct. 1293, 94 L.Ed.2d 149 (1987). Summary Judgment is not appropriate for the fraud claim. Visa has brought forth sufficient evidence to establish genuine questions of material fact in regard to each element of the claim.

Visa's claim for trademark infringement is founded upon the provisions of the Lanham Act. 15 U.S.C. § 1114. Visa states that Sears has infringed on Visa's marks within the meaning of the Act because Visa never licensed Sears to issue Visa cards and, in fact, expressly prohibited Sears from issuing the cards.

Sears argues that a trademark infringement claim cannot proceed because the Visa cards issued by MountainWest were genuine and Visa expressly consented to allow MountainWest to continue servicing its pre-existing Visa card accounts. A basic principle of trademark law is that there can be no liability for trademark infringement when the trademark owner consents to use of the mark.

Sears cites numerous occasions when Visa's attitude has been permissive in allowing other Sears affiliates to participate in the Visa

program. Sears states that because Visa consented to the continuation of MountainWest's Visa card program throughout the time period relevant to the pendency of this lawsuit, Visa's trademark infringement claim fails as a matter of law. Visa responds by stating that Sears knowingly "used Visa's trademark after the expiration of a trademark license, and before the issuance of any valid new one. Sears' acquisition of MountainWest Savings terminated any authority MountainWest had to issue Visa cards." (Visa's Memorandum in Opposition to Motion for Summary Judgment on Visa's Non-antitrust Counterclaims at p. 32). Visa also cites *Lone Mountain Prod. Co. v. Natural Gas Pipeline Co.*, 710 F.Supp. 305, 311 (D. Utah 1989), for the proposition that "the fact that party has not enforced a provision in another contract on a previous occasion does not grant the other party a license to ignore that provision in a subsequent contract."

To be entitled to damages for trademark infringement, Visa bears the burden of establishing either that Visa has lost business and profits as a result of Sears' alleged infringement, or that Sears has shown an egregious display of bad faith in infringing on Visa's mark. *Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 917, 919 (Fed. Cir.1984).

Although actual damages may not be readily provable, Visa may be able to show bad faith on the part of Sears. Proof of actual damages is unnecessary to support a trademark claim where the infringer has acted in bad faith. *See Web Printing Controls Co. v. Oxy-Dry Corp.*, 906 F.2d 1202, 1204 (7th Cir.1990). Sears argues that Visa's consent to allow MountainWest to continue servicing its nearly 6,300 Visa cardholders defeats any claim that Visa may have for trademark infringement. Visa claims that the acquisition of MountainWest by Sears was a result of fraud and as a result of that fraud, MountainWest's license to issue Visa cards should be revoked. While Visa's consent may seem to undermine its claim for trademark infringement, it may still prevail if bad faith is shown. There is at least a triable issue as to whether Sears wilfully deceived Visa after it learned that Visa would not admit Sears to membership.

Furthermore, the resolution of the legality of Bylaw 2.06 is critical to the determination of the trademark infringement claim. If the bylaw is valid, then Sear's continued distribution of Visa cards

after the acquisition of MountainWest constitutes trademark infringement. However, if the bylaw is invalid, there is no basis for a claim of trademark infringement. A company authorized to issue Visa cards was doing precisely that. The determination of the trademark infringement claim is contingent upon the resolution of Bylaw 2.06 and thus, Summary Judgment is inappropriate at this time.

Visa's claim for breach of contract is similarly unsuited for Summary Judgment. Sears states that "based on the Court's opinion earlier this year, the only remaining issue before this Court is whether Bylaw 2.06 is valid under the antitrust laws." This statement only begs the question as to the validity of Bylaw 2.06 and necessarily precludes Summary Judgment until validity of the bylaw is resolved.

There is sufficient evidence in the record to allow Visa's non-antitrust counterclaims to proceed to trial, accordingly Sears' Motion for Summary Judgment on the non-antitrust counterclaims is denied.

IV. *Sears' Motion to Bifurcate the Antitrust Issues and the Non-Antitrust Issues*

Sears has moved to bifurcate the trial of the antitrust issues and the non-antitrust issues. In deciding whether to bifurcate the trial, the court has broad discretion. As stated in *Eastridge Dev. Co. v. Halpert Assocs.*, 853 F.2d 772, 781 (10th Cir.1988):

> The Federal Rules of Civil Procedure give district courts broad discretion in deciding whether to sever issues for trail and the exercise of that discretion will be set aside only if clearly abused.

(quoting *Easton v. City of Boulder, Colo.*, 776 F.2d 1441, 1447 (10th Cir.1985), *cert. denied*, 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986)).

In using its discretion the court is guided by Federal Rule of Civil Procedure 42(b):

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of

> any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

The controlling considerations in Rule 42(b) are economy and avoiding prejudice. In light of these considerations the court hereby bifurcates this case into two proceedings.

The first proceeding will address only the issue of antitrust liability. More specifically, the first proceeding will determine liability under Sears' Section One Sherman Act claim, and Visa's Section Seven Clayton Act counterclaim. The second proceeding will determine antitrust damages, if necessary, and fully adjudicate all other claims and counterclaims. Whether both proceedings will use the same jury will be decided after consultation with counsel at or before the final pre-trial conference.

Bifurcation will increase trial efficiency. There may be no need to hold the second proceeding. Even if there is a second proceeding the number of issues involved may be reduced by the outcome of the first proceeding. Finally, because some evidence pertinent to the non-antitrust counterclaims, particularly those dealing with fraud and bad faith, probably will not be relevant to the antitrust dispute, the first proceeding may be shorter than originally anticipated.

Bifurcation will also avoid the possibility of unfair prejudice to either party. Visa has alleged several counterclaims which could prejudice or confuse the outcome of the antitrust dispute. Visa has alleged fraudulent activity by both Sears and its counsel. Visa is seeking to compel evidence from Sears' counsel to further investigate the fraud charges. Sears argues that its counsel may need to be called as witnesses to defend against the fraud charges. Calling trial counsel could have a prejudicial effect on the antitrust trial. Even if the attorneys were not called, allowing Visa's fraud claims in the same action as the antitrust claims could undermine the focus of the trier-of-fact on the important antitrust issues raised in this action.

Visa has also alleged unfair trade practices and trademark infringement. Visa will support these allegations by attempting to

show Sears' bad faith and improper conduct. As discussed above, this type of evidence could prejudice or confuse the trial of the antitrust issues.

From the outset this case has focused on the antitrust dispute. Visa's non-antitrust counterclaims will raise arguments and introduce evidence which could hinder a fair trial of the antitrust issues. By bifurcating the trial the court will insure a fair, unprejudiced decision on the merits of the antitrust dispute without the complications and confusion which could arise from the other claims and counterclaims. Given the importance of the antitrust dispute the court believes it is essential to bifurcate; providing a clear, uncluttered decision in the first proceeding, addressing only antitrust liability.

V. *Both Parties' Motions to Compel Discovery and Sears' Motion to Quash Subpoena*

Visa's Motion to Compel Discovery, Sears' Motion to Compel Discovery, and Sears' Motion to Quash the Subpoena sent to Kirkland & Ellis concern discovery disputes relating to Visa's non-antitrust counterclaims. In light of the court's ruling on the Motion to Bifurcate, the court finds that it is premature to rule on these motions at this time. The court reserves ruling on these motions until a trial date and scheduling order on the non-antitrust counterclaims has been established after consultation with counsel for the parties.

CONCLUSION

Based on the foregoing,

IT IS HEREBY ORDERED

1) Visa's Motion for Summary Judgment is DENIED.

2) Sears' Motion for Summary Judgement on Visa's antitrust counterclaim is DENIED.

3) Sears' Motion for Summary Judgment on Visa's non-antitrust counterclaims is DENIED.

4) Sears' Motion to Bifurcate the trial of the antitrust and non-antitrust issues is GRANTED insofar as the first proceeding will determine liability on the antitrust issues, and the second proceeding

will determine damages, if necessary, and the non-antitrust claims and counterclaims.

5) Visa's Motion to Compel Discovery, Sears' Motion to Compel Discovery and Sears' Motion to Quash Subpoena are continued pending further consultation with counsel.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SCFC ILC, INC., doing business as MountainWest Financial, Inc., *Plaintiff-Counter-Defendant-Appellee*, v. VISA USA, INC., *Defendant-Counter-Claimant-Appellant*.	No. 93-4105

ORDER
Entered December 5, 1994

Before MOORE, SETH, Circuit Judges, and DAUGHTERY*, District Judge.

* The Honorable Frederick A. Daugherty, United States District Judge for the Western District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk
By: L. Balzano, Deputy Clerk